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SEP 19 1994

In The

Supreme Court of the United States

October Term, 199_

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

APPENDICES - II

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APPENDIX U

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 92 -3374 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS, et al.
- VS -
THE ARROGANT ORWELLIAN BUREAUCRATS OF AETN;
APPELLEES et al

SUPPLEMENTARY DIGEST OF POINTS AND AUTHORITIES

✧

REBUTTAL TO STATE'S RESPONSE TO REQUEST FOR REHEARING *EN BANC* TO PROTECT THE SOVEREIGN RIGHTS OF THE PEOPLE AND THE LAW OF THE LAND

* * *

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now after the lapse of more than seventy years (or, now, 200 years), sought to be avoided."

Mr. Justice DAVIS, *ex parte Milligan*, 4 Wall 2 (118) 1866)

* * *

"As the Supreme Court unanimously held in *Red Lion* {*Broadcasting Co. v. FCC,* 395 U.S. 367; 89 S.Ct. 1794; 23 L.Ed.2d 371 (1969)}:

'*It is the right of the viewers and listeners,* not the right of the broadcasters *which is paramount.* It is the purpose of

the First Amendment *to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,* rather than to countenance monopolization of the market, whether it be by the government or a private licensee. *It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.* ***That right may not constitutionally be abridged.'***

Red Lion, at 395 U.S. at 390, 89 S.Ct. at 1806 (citations omitted.)

"THE PROPER INQUIRY FOR THIS COURT, then, should not be whether the Communications Act grants state broadcasters editorial discretion, but *whether the action of state officials in these cases abridged free expression protected by the First Amendment.*

* * *

"... ('[S]peech concerning public affairs is more than self-expression; *its is the essence of self-government.')* Self-government suffers *when those in power suppress competing views on public issues...* See *(First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765; 98 S.Ct. 1407; 55 L.Ed.2d 707 (1978)).

[Emphasis supplied]

Muir v. Alabama Ed. Television Com'n., 688 F.2d at 1055

But protecting speech is not a burden on the nation, but a vital blessing. As Justice Charles Evans HUGHES said: "... the more imperative is our need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes if desired, may be obtained by peaceful means. **Therein lies the security of the Republic, *the very foundation of constitutional government.***"

DeJonge v. Oregon, 299 U.S. 353, 365 (1937)

"[F]ree and general discussion of public matters seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

Grosjean v. American Press Co., 297 U.S. 233, 250; 56 S.Ct. 444, 449; 80 L.Ed. 660 (1936)

"The basis of our government being the opinion of the people, the very first object should be to keep that right ..."

Thomas Jefferson,

Letter to Col. Edward Carrington, Jan. 16, 1787

* * *

THE F.C.C. "REVERSED" *DEYOUNG*

2-C. All of the precedents cited by State Defendants to abridge First Amendment Rights, including *DeYoung,* have been *factually* and *de jure* reversed and fatally invalidated by the FCC's own unilateral reversal of the Fairness Doctrine as more fully shown herein.

In all past cases where the rights of the People to hear and to be informed and the rights of candidates were restricted in seeking rights under *47 USC 315*, the courts weighed into the balance at least three counterbalancing factors, the most important and weightiest by far was The Fairness Doctrine.

This most important of these three balancing factors is {in fact, all three balancing factors, are} *absent from the balancing equation in the case at bar.*

"The magnitude of the present danger (the creation of propaganda organs for the Government) that the statute is designed to avoid is admittedly a matter about which reasonable judges may disagree. Moreover, I would agree that *the risk would be greater if other statutory safeguards* were removed ...*"

{Italics added}

FCC v. LWV of California, 104 S.Ct. at 3136, 468 U.S. at 417 (1984)

The FCC has unilaterally repealed the Fairness Doctrine by reinterpretation of its own rules in response to the pressures of the powerful broadcaster's lobby. *FCC 87-266*; MM-263, August 4, 1987; *FCC 88-131*; MM 319, March 24, 1988.

This revocation *de facto,* if not *de jure,* reverses all of the case law based on the supposed mitigating and "balancing" factor of the bureaucratically dispatched Fairness Doctrine.**

---

* The basis for the Fairness Doctrine *is statutory* ... Note 12 at 2106 and and 141; The Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to §315 of the Communications Act ... Note 15, *Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com.*, 93 S.Ct. at 2127, 412 U.S. at 185 (1973)

"Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The basic principle underlying that responsibility is 'the right of the public to be informed ..."

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2091, 412 U.S. at 113 (1973)

This decision, and all cognate decisions, were predicated on the cornerstone of the Fairness Doctrine. The CBS decision was based upon the specific warranty of the FCC that it would maintain and enforce the Fairness Doctrine against licensees to protect the First Amendment requirements of the People:

"The {FCC} Commission made it clear, however, that it does not intend to discard the Fairness Doctrine ..." {emphasis added}

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2101, 412 U.S. at 133.

However, the FCC broke faith with the Court, *the Constitution, the People, the Congress and its own longstanding rules and policies by unilaterally revoking and "discarding" the Fairness Doctrine.* This FCC (betrayal) demolished the foundations of all the progeny of cases from *Red Lion, supra.* While *DeYoung,* (1990) did not cite the FCC-assassinated Fairness Doctrine, *all* of the cases relied upon by the three judge panel depended upon the FCC-sabotaged *Fairness Doctrine.*

"Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken *within the framework of the regulatory scheme that has evolved over the course of the past half century.* For, during that time, Congress and its chosen regulatory agency have established *a delicately balanced system of regulation intended to serve the interests of all concerned."* {Italics supplied}

** If a bureaucratic interpretation has the power to disannul or repeal basic constitutional provisions and alienate inalienable rights and terminate indefeasible rights, then in such an illogical wonderland it would not be novel for an unelected bureaucrat to reverse and overturn decisions of the Supreme Court, including *Marbury v. Madison, supra.*

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2086, 412 U.S. at 102.

This citation was relied on by the appellate court in *Johnson v. F.C.C.*, 829 F.2d at 160, 161, et seq., because "the Commission in developing the fairness doctrine, had attempted to strike a balance that would satisfy the First Amendment interests of all concerned." And the pervasive, complex scheme of regulation provided "several access provisions," etc.

Johnson was decided September 22, 1987. Ironically, the FCC reversal that closed the remaining access provisions and pushed the delicately balanced regulatory scheme off the tightrope was issued after the case was argued but only a few weeks before the opinion which was based on the presumption that the Fairness Doctrine was alive and well, helping to prevent the First Amendment from falling to its doom.

The Fairness Doctrine was far from adequate in Petitioner's view, but without it, the regulatory scheme is totally unbalanced, and the results of every decision that weighed it into the balance would have been in favor of the People and the private Citizen.

"The opinion of the Court of Appeals asserted that the Fairness Doctrine, insofar as it allows broadcasters to exercise certain journalistic judgments over the discussion of public issues, *is inadequate to meet the public's interest in being informed.* The present (1972) system, the court held, 'conforms . . . to a paternalistic structure structure in which licensees and bureaucrats decide what issues are "important," and how "fully" to cover them, and the format, time and style of the coverage.'

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 146 U.S.App.D.C., at 195, 450 F.2d, at 656 ...

"That {Fairness} doctrine admittedly has not always brought to the public perfect or, indeed, even consistently high-quality treatment of all public events and issues ..."

Columbia Broadcasting Sys Inc., v. Democratic Nat. Com., 93 S.Ct. at 2100, 412 U.S. at 130.

"The Fairness Doctrine, standing alone, is insufficient - in theory as well as in practice - to provide the kind of 'uninhibited, robust, and wide-open' exchange of views to which the public is constitutionally entitled."

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2129, 412 U.S. at 187

("Because of the importance of the values at stake, and the ability of the defendant usually to offer *a colorably permissible reason* for its action, *the trier of fact must critically examine the asserted rationale for the defendant's conduct.*")
Muir, at 1059, italics supplied

* * *

"Although the scope of the prohibition was phrased in general terms and applied to a selected group of speakers, it was obviously directed at spokesmen for a particular point of view ... It was a classic case of viewpoint-based prohibition."
Comment on *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980)
Cited in *FCC v. LWV of California*, 104 S.Ct. at 3137, 468 U.S. 418

Thus, it is clear that the animus against petitioners, as persons and as a class of free and independent people and their ideas, is a prejudicial animosity against those, who champion Free Speech and Independent thought, by those in the state *nomenklatura* who feel they have a "divine right," or at least secular omnipotence, To Suppress And Discriminate Against Any Who Stray From Their Tyrannical Viewpoint of **"Politically Correct" *Thought Control.***

"If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - not free thought for those who agree with us *but freedom for the thought that we hate.*"
Justice Oliver Wendell HOLMES, Jr. in
United States v. Schwimmer, 279 U.S. 644 at 653 (1928)

* * *

4. THERE IS NO EFFECTIVE "COMPREHENSIVE ADMINISTRATIVE SCHEME" TO PROTECT THE FEDERAL RIGHTS CONFERRED BY *47 USC 315.*

In fact the scheme is contrived to prevent *any* candidate denied these rights from ever exercising them. This scheme operated to make it impossible for Petitioner Forbes to have

his rights or remedial day in court. In the "Trinity" letter submitted by the State, after a page of unabashed bureaucratic gobbledegook in which the scheme is used to deny Trinity and the People of California their respective rights. The California debate was aired on May 17, 1992. The letter was released in Washington D.C. on May 26th, *nine days after the debate.* The election was June 2nd. This scheme that makes a mockery of justice and due process says: "Application for Review by the full Commission *may* be requested *within thirty days* of public notice of this letter ... by writing (to) the Secretary, Federal Communications, Washington, D.C. 20554 ..."

This scrap of paper, this blurry copy of a letter to someone from a bureaucrat in the FCC has no power to deprive the People, Forbes, *or any American Citizen of their God-given Rights secured by the supreme covenant, the Constitution of the United States.*

The obscure FCC letter has less weight than the "administrative summons" which the Supreme Court condemned as "**very oppressive**" *because it "appears to be a lawful command on the surface*, many citizens, because of their respect for what only *appears* to be law, *are cunningly coerced into waiving their rights*, due to ignorance ... because it *appears to be official and legal in form ..."* *United States v. Minker*, 350 U.S. 179 at 187

But even if the FCC protected the rights of Candidate Trinity, it's ruling would have come too late. For even if the FCC scheme were not stacked to *routinely* deny candidate and the People their rights, it fails, because:

JUSTICE DELAYED IS *JUSTICE DENIED.*

But the FCC *routinely* gives sweetheart interpretations to licensees that censor candidates and viewpoints and ambushes the People and their Rights in a hopeless *cul-de-sac.* "Was your denial in 'good faith'?" "Why, *of course.*" {Who would answer otherwise?} "Denial approved because the denier says it was done in 'good faith'."

Governmental opinion of enforceability of FCC rules clearly depends *on partisan interpretation.* e.g., See Note 8 at 3112, and "... the Department of Justice *under a new administration* announced that it would defend the statute." {italics supplied}
FCC v. League of Women Voters of California, 104 S.Ct. at 3113

This Court has the power and the duty to set aside any unlawful action that is unconstitutional, or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The Constitution of the United States, Article III, Section 2; Article VI; Amendments I, V & XIV
Administrative Procedure Act, 5 USC 553, 706(2)(a)
Boyd v. United States, 116 U.S. 616 (1886)
Mugler v. Kansas, 123 U.S. 623, 661

In particular, the courts should not "'defer' to the judgment of the ... Commission on a constitutional question, or ... hesitate to invoke the Constitution ..."

Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 93 S.Ct. 2087; 412 U.S. at 103

* * *

"... The very simple answer to that position {that the courts defer to the Commission on constitutional questions} is that *FCC regulation is designed neither to preempt judicial scrutiny nor to redress state censorship as alleged in these cases.*" *Muir* at 1056

"I'll be judge. I'll be jury," said cunning old Fury; "I'll try the whole cause, and condemn you to death."

Lewis Carroll, *Alice's Adventures in Wonderland,* Ch. 3.

"... [W]hile it is true that the FCC hears complaints similar to those raised in these cases, *it is also true that the FCC routinely denies relief.* A brief review of the cases cited ... reveals that the FCC steadfastly refuses to depart from its 'longstanding policy of deferring to licensee discretion.' *Right to Life, Inc. v. WAVE-TV,* 59 FCC2d 1103 (1976.)" *Muir*, at 1056

"... [T]he FCC routinely defers to licensee 'discretion as to the manner in which a controversial issue is to be covered, including such matters as appropriate spokesman and program format.' *William Harsha,* 31 FCC2d 847 (1971). *Muir*, at 1057

"Complaints regarding (censorship) decisions are *regularly* denied (by the FCC)...) *Muir*, at 1056

"Thus it is clear that the majority's deference to the FCC in these cases that present important constitutional questions amounts to nothing more than '... a promise to the ear ...' which will most certainly be broken 'to the hope.' *See Cuthbert v. United States,* 278 F.2d 220 (5th Cir. 1960). Relying on the system of FCC regulation, the majority has granted state broadcasters immunity from constitutional scrutiny. There is nothing, however, in the Communications Act or in the system of FCC regulation which prevents judicial scrutiny. On the contrary, the Supreme Court has recognized the need for vigilance in the face of governmental regulation. *See, e.g., Red Lion, supra,* 395 U.S. at 390, 89 S.Ct. at 1806; *CBS, Inc. v. Democratic Nat'l. Comm.,* 412 U.S. at 104-05, 93 S.Ct. at 2087-88. *To rely on FCC regulation is to create a substantial gap in the protection of First Amendment interests.* Because the FCC does not distinguish between private and public broadcasters in its regulation of the airwaves ... *it provides no protection from the kind of state censorship alleged in these cases.* *Muir*, at 1057

"It is the judiciary which is the ultimate arbiter of the fundamental rights involved in these cases.[5] *Courts may not abdicate their duty by reference to a system of administrative regulation,* or because they would prefer that the plaintiffs take their complaints elsewhere.") *Muir*, at 1059

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5. The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities, and officials and to establish them as legal principles to be applied by the courts...

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943) *See Wesberry v. Sanders,* 376 U.S. 1, 17,18; 84 S.Ct. 526, 534-35; 11 L.Ed.2d 481 (1964).

"... ***[T]he Court has elevated 'the Communications Act above the Constitution.'*** "

Barnstone, supra, 514 F.Supp. at 672-73, 686.

Moreover, The Court Has Abdicated Its Duty In An Area In Which The Plaintiffs Have No Comparable Remedy...

Muir, at 1054 (Emphasis supplied.)

Thus, the People and Petitioner Forbes have no adequate

remedy under law other than *constitutional* courts and at least action under *42 USC 1981*, et seq.

THE UNBALANCED SCALES OF JUSTICE

5. In all past cases where the rights of candidates were restricted in seeking rights under *47 USC 315*, the courts weighed into the balance at least three counterbalancing factors:

(A) The Fairness Doctrine;

(B) Unrestricted access to buy time;

And, (C) alternate means of presenting views.

None of these three balancing factors are present in the case at bar.

Petitioner respectfully calls the Court's attention to ***The Factual Change That Changes The Results Of All Case Law*** from *Red Lion* through *DeYoung*. The FCC unilaterally repealed the Fairness Doctrine by reinterpretation of its own rules in response to the pressures of the powerful broadcaster's lobby. *FCC 87-266*; MM-263, August 4, 1987; *FCC 88-131*; MM 319, March 24, 1988.

This revocation *de facto,* and *de jure,* reverses *all* of the case law, including *DeYoung,* based on the supposed mitigating and "balancing" factor of the bureaucratically-dispatched Fairness Doctrine as more fully shown in petitioner's **"The FCC "Reversed" *DeYoung*"** in **2-C** above.

* * *

Furthermore, as a factual matter, *access to commercial time was also denied* Petitioner Forbes because, contrary to law, the ABC and NBC affiliates, licensed by the FCC to operate within the third district, censored and refused to air the FCC-approved ads of candidate Forbes causing him and the people grave and inestimable, irreparable harm.

The First Amendment; *The Due Process and Equal Protections provisions of the Fourteenth Amendment*; *CBS, Inc.*, 453 U.S. 367 (1981); Communications Act of 1934, Sections 312(a)(7); 315; CFR 73.1940(c);1941(b); 68 FCC 2d 1079 (1978); FCC 8210-AJZ/MJM of 21 August, 1992, et seq.

(C) All of the newsmedia in the third congressional district, contrary to the standards of professional journalism and the objective criteria for prioritizing the newsworthiness of stories, acted in concert to suppress virtually all news of Forbes' candidacy or to present him and his candidacy in an extremely distorted and inaccurate light.*

In the instant case, all balance is lost, because of the absence of all alleviating factors: (A) the Fairness Doctrine; (B) the right to buy time for political advertising; and, (C) the dearth of any ef-

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*In any other area of life this would be a crime of theft by deception, fraud by misrepresentation, or at least a criminal conspiracy to withhold or suppress critical facts. For example, an insurance salesman would lose his license if he twisted the truth in this manner. Would an automobile manufacture that knew it's brake design was defective and that its cars were almost certain to burst into flames upon impact be allowed to mislead its customers that its products were safe? Yet the precious property of franchise and the right to representative government is less protected from fraud by charlatan counterfeit swindle than a consumer who falls victim to a fast talking con artist.

The effect of all this was to deprive voters of effective suffrage based upon informed consent: "*I wanted to vote for your husband (Petitioner Forbes), but I was afraid to throw my vote away!*" summarizes the quandary that *de facto* deprived the People of the third district of their right to freely choose their own representatives. This deceitful Hobson's choice is analogous to depriving an innocent accused of his right to counsel and *forcing him to make an uninformed or misinformed choice* between plea bargaining or "throwing your life and freedom away, because you can't win if you plead not guilty." *Miranda v. Arizona*, 384 U.S. 436

Petitioner Forbes does not contend that the print media is not free to lie, censor, warp or distort the news and truth in any way that its conscience allows; but petitioner does state and aver that *all* avenues of presenting his ideas to the people were effectively and *de facto* barred in the 3rd district; even though news media *outside the district*, including representatives of *Asahi*, the largest news medium in Japan, who contacted Forbes because *they* believed his candidacy was extremely newsworthy.

Petitioner Forbes respectfully calls the court's attention to the discussion of the fact, unforeseen in 1791, that "in practical terms the newspapers and magazine, like TV and radio, are available only to a select few."
Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 93 S.Ct. 2080 at 2114~2116; 412 U.S. at 159~163; and at 2132,33 and 192~196, respectively.

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fective alternative form of communication or expression:

All of the canons and rationale expounded in the plethora of otherwise sharply divided opinions, concurrences and dissents in *Red Lion* and its progeny by many of the wisest and learned judges and justices, all unite to say in this case;

The constant inroads against the paramount rights of the people, the steady piling of one sided weights in favor of broadcasters and bureaucrats against the rights of the People and of Citizens and Persons who seek to exercise their most precious and fundamental rights, have combined to cause the carefully, precariously balanced law to fall from the tightrope;

And this honorable court has the power and the duty to rescue rule by law by invoking the constitutional safety net.

6. Abridgement of First Amendment Rights by Congress, the FCC, Commercial Licensees, the Courts, the AETN Defendants, or Anyone is *Prima facie* Unconstitutional

*** The ... Defendants cannot hide behind the shameful fig leaf of bureaucratic interpretations.

"I believe there are more instances of the abridgment of the freedom of the people *by gradual and silent encroachments of those in power* than by violent and sudden usurpations."

James Madison,
Speech in the Virginia Convention, June 16, 1788

The ... Defendants use as a pretense for their violations of the Constitution and laws, an unconstitutional usurpation by FCC bureaucrats. But it is mere chicanery that pays hypocritical lip service to the First Amendment while ravishing it.

The FCC misuses *Chisholm v. F.C.C.*, 538 F.2d 349 (1976) as a pretext, an *irrational* 'rationale' to give the state the powers to abridge the paramount Free Speech Rights of the People and of Citizens by *de facto* censoring viewpoints, ideas, expressions and persons. At most, *Chisholm*, the beachhead used for invasions against the People's First Amendment Rights, made debates sponsored by *a non*-licensee, provided further that there is *no evidence of broadcaster favoritism,* exempt from

equal time provisions on *a case-by-case basis.*

In this case, [1] *the sponsor is a licensee.* Moreover, [2] *the sponsor is the state.* And, [3] there is abundant evidence of state *favoritism* on the one hand, and *hostility, unreasonable, arbitrary and capricious discrimination against the petitioner* on the other. And, [4] there is a shameful record of *routine, after the fact, denial by the agency that holds the People's Rights by the throat.*

But the FCC, given an inch by the courts, has taken miles and miles of rights. They have trespassed over the boundary, and once the wall was breached they have encroached on and claimed all the public's domain as their very own until there is no longer a place for the People, the Individual Citizen or for their Rights. They would banish the Law of the Land from the Land, and deny by their response even room for the razor thin paper upon which these rights are written.

The FCC has *unilaterally* exempted political debates sponsored by broadcasters. Free of all fear of restraint they have *ultra vires* included *public* licensees, State agents, in the *nomenklatura,* the exclusive club of Censors and Czars with the power to decide what the people may be permitted, or denied the right, to see and hear.

The State has "attempted to bring evidence before the court" that the FCC has given them *carte blanche* to censor and discriminate by attaching a virtually illegible letter, apparently from the FCC, in which the FCC *says* it has the power to grant the powers of censorship to privileged licensees; and to "prove it," by pseudo-legalistic tautology, the FCC *says* it has the power *because the FCC says* because the FCC says *because the FCC says ... ad infinitum, ad absurdum.*

7. The FCC Interpretations Used by the ... Defendants are Unconstitutionally Broad, Vague and Unconstitutionally Applied

The power to censor and discriminate against candidates and viewpoints based on the subjective "good faith news judgment" of FCC licensees is unconstitutionally vague, incapable of being measured by any objective criteria, is an open invitation to arbitrary, capricious, unreasonable, discriminatory

and viewpoint and/or personality based denial of equal opportunities, rights and facilities. So vague a phrase is equivalent to restricting Free Speech to the pleasure and prejudices of a privileged class, a *nomenklatura* of state licensed censors ...

Paraphrasing the Court:

"Surely no one would seriously suggest that judicial independence would be strengthened *by allowing removal of federal judges only by 'a good faith' determination by a handful of congressional 'experts'* on a special 'Committee to Protect Judicial Independence.'!"

Bowsher v. Synar, 106 S.Ct., at 3190; 478 U.S., at 730.

This abridgement in "good faith" language is not only capable of being applied unconstitutionally, it has in fact been used by the ... defendants to deny the rights of petitioners.

8. The FCC's Claimed Powers are Violative of The Fundamental Principle of Separation of Powers

The FCC's combined powers of [1] *de facto* legislating, [2] executing and [3] judicially interpreting and reviewing and automatically approving its own actions by *post hoc* rationalizations are totally contrary to the spirit and express language of the Constitution and due process Law of the Land.

The People retained their inherent Rights and Powers for themselves and their posterity, with the exception of certain limited powers which they vested and delegated precisely into three separate and distinct branches of the government they created: The Legislative, *Article I*; The Executive, *Article II*; and the Judicial, *Article III*, respectively.

INS v. Chadha, 462 U.S. 919, 951; 103 S.Ct. 2764, 2784; 77 L.Ed.2d 317 (1983)

"It is a fundamental principle in our institutions, *indispensable to the preservation of public liberty,* that one of the separate departments of government shall not usurp powers committed by the Constitution to another department."

Mugler v. Kansas, 123 U.S. 623, 662 {Italics supplied.}

The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power *the better to secure liberty.*"

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635; 72 S.Ct. 863, 870; 96 L.Ed 1153 (1953) {Italics supplied.}

Congress has created a nonconstitutional, *de facto* fourth branch of government, the bureaucracy, under the general heading of Independent agencies, of which the Federal Communications Commission, the FCC, is one. Constitutionally, the FCC is neither fish nor fowl, but like an extraconstitutional monster metamorphosing from a mutant proliferation of regulations it has taken and usurped for itself the combined powers of all three branches of lawful government and has *de facto* decreed itself higher than: [1] each; and, [2] all of the three lawful branches of government; [3] the Constitutional contract which created the balanced and limited government; and, [4] The People themselves.

"[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates..." Montesquieu, quoted by James Madison in *The Federalist No. 47*, p. 325 (J. Cook ed. 1961). Cited favorably in *Bowsher v. Synar*, 106 S.Ct. at 3185; 478 U.S. at 722.

"That to secure these {God-given} rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ... the Legislative powers, *incapable of Annihilation,* have returned to the People ..." {Italics supplied.}

The Unanimous Declaration {of Independence} of the thirteen united States of America, In Congress, July 4, 1776.

Legislation to become law must first be properly passed by both Houses and affirmative or passive approval of the President or repassed by two thirds of the members of each House. *Article I, Section 7.*

"Regulations are not the work of the legislature and do not have the effect of the law in theory."

Black's Law Dictionary, Abridged 5th edition, p. 668.

Gradually, **the FCC has usurped legislative powers** and exceeded all lawful authority via so-called rulemaking procedures. These procedures have been so eroded and taken for granted without checks or balances that mere declaratory findings and interpretations, devoid of due process, have the practical effect of legislation.

Congress has no such power to divest itself of nor abdicate its mandated duties by forfeiting this important, cardinal legislative power entrusted to it by the People, who instituted a representative government to secure their innate, God-endowed Natural Rights. The People specifically delegated their legislative powers, which are "incapable of annihilation," to elected representatives who may not abandon, forsake, nor desert the People by surrendering this elemental power to any other.

The FCC has also usurped executive powers because it enforces and interprets both constitutionally enacted legislation and its own pseudo-"legislation."

"Interpreting the law enacted by Congress to implement the legislative mandate *is the very essence of 'execution' of the law.*"

Bowsher v. Synar, 106 S.Ct. 3181 at 3191; 478 U.S. 714 at 733

THE FCC HAS ALSO USURPED JUDICIAL POWERS that *the People have entrusted to the supreme Court and inferior Courts constitutionally established by the Congress.* No Court, and certainly no agency, not even contemplated by the People nor the Constitution, has the lawful authority to deny [a] the People nor any Person their God-given rights; and [b] the equal protections thereof; [c] Due Process; and [d] their Common Law Right to their Day in Court expressly secured by *Section 2 of Article III (& Amendment VII).*

Petitioner Forbes respectfully points out that the inferior courts do not overrule the Supreme Court. And it is well established doctrine that no agent, agency or creature may have powers denied to the higher branch:

Thus, if the king cannot behead an accused unless condemned by jury, surely the mayor, the city councilmen, the municipal judge, the city attorney, the policeman on the beat,

or the sanitation engineer may not either. And, if the king may not abridge free speech, then surely neither the court jester, the FCC nor the ... Defendants may lawfully censor speech either.

Thus the ... Defendants *usurp* powers under color of *not* law, *but bureaucratic permission,* to do what is denied to it by the Constitution. The FCC, ... a mere extra-constitutional agency claims to have tyrannical powers that *the Constitution expressly forbids* to even the three constitutional branches of government.

9. The FCC Claims to Power are *Beyond* Usurpa-

"ETERNAL VIGILANCE IS THE PRICE OF LIBERTY!"
Thomas Jefferson

REMONSTRANCE
By James Madison,
Father of The United States Constitution and Bill of Rights

"The preservation of a free government requires not merely that the metes and bounds which separate each department of power be invariably maintained, but more especially *that neither of them be suffered to over leap the great barrier which defends the Rights of the People.*

"The rulers who are guilty of such an encroachment *exceed the commission from which they derive their authority,* and are tyrants.

"Because it is proper to take alarm at the first experiment on our Liberties; We hold this prudent jealousy to be the First Duty of Citizens and one of the noblest characteristics of the late Revolution.

"The Freemen of America did not wait till usurped power had strengthened itself by exercise and *entangled the question in precedents.*

"They saw all the consequences in the Principle, and they avoided the consequences by denying the Principle. We revere this lesson too much soon to forget it."

Letters and Other Writings of James Madison, Fourth President of the United States, Congress Edition, in 4 Volumes, Philadelphia, 1865

The Defendants and the FCC have "usurped power and strengthened" this usurpation "by exercise *and entangled the question in precedents.*"

tion, *They Are an Extortion to Transmute Our Republic Under Law into a Sneering Tyranny*

"As Usurpation is the Exercise of Power, which another hath a Right to; *so Tyranny is the Exercise of Power beyond Right, **which nobody can have a right to ...***"

John Locke, *The Works of John Locke, Esq.*, In Three Volumes; Of Civil Government, Chapter XVIII, Of Tyranny, p. 199, London, 1714

"Unlimited Power Is Apt To Corrupt The Minds Of Those Who Possess It; And This I Know, My Lords, That *Where Law Ends, Tyranny Begins.*"

William Pitt, *Case of Wilkes. Speech* [January 9, 1770]

"The only prize much cared for by the powerful is power. The prize of the general is not a bigger tent, but command."

Law and the Court, Justice Oliver Wendell Holmes, Jr., 1913

Without effective checks and balances the capacity for self-aggrandizement with all power aggregating into the hands of a *nomenklatura* of privileged licensees and contemptuous bureaucrats, the mere claim to unabridgeable rights for the People by Petitioner Forbes is disparaged as a civil "sin."

"WHERE LAW ENDS, *TYRANNY BEGINS.*"

John Locke, *Second Treatise of Government,* Sec. 202 [1690]

"Power tends to corrupt and absolute power corrupts absolutely." Lord Acton,

Letter to Bishop Mandell Creighton, [April 5th, 1887]

This FCC claim is beyond separation of powers. *It is the raw consolidationof all powers in a virtually unrestrained agency.* Even when acting properly and not violating constitutional rights, the FCC is NOT the Legislature. It is NOT the Executive. *It is NOT the Judiciary*. The FCC was created to protect the People from the unregulated power of broadcasters, not to conspire or to be misused to deprive the People of their God-given rights.

The Rights to Freedom of Speech, to express and to hear, all

political Rights are secured under the First Amendment. The Fourteenth Amendment guarantees equal protection of the laws. The Common Law Rights to Justice and Juries are implied and expressed throughout our Constitution and the Law of the Land. So-called "administrative remedies" may not deny First Amendment Rights and Equal protections, and then deny due process and right to redress in the courts and trial by jury.

Neither the FBI, the CIA, nor any other federal law enforcement agency has lawful authority to give state officials permission to murder or assassinate citizens. Neither does the FCC have the lawful authority to give (defendants) permission to assassinate rights protected by the First Amendment.

For the State Defendants or any private persons or entities to claim that an unelected regulatory agency in Washington D.C. has been delegated powers to give them license to deprive the People and/or any Citizen of their Rights and their Rights to Equal Protection of the Laws and their Day in Court is *prima facie* intolerable.

Furthermore, it is a violation of Due Process.

* * *

Statement Of Separation, Usurpation & Tyranny
Questions Presented

Does the court defend the doctrine of inherent separation of powers from *ultra vires* usurpations?

And does it limit agencies of public power from tyrannically arrogating powers expressly denied to any agency or arm of government whatsoever?

"Necessity is the plea of every infringement of human liberty; it is the argument of tyrants; it is the creed of slaves."
William Pitt

It may make it easier on Congress, whose individual members fear the power of a united and hostile association of media, to look the other way when the FCC operates in total contempt and opposition of congressional intent; but that does not make it right or lawful.

Petitioner herein incorporates *the entire dissenting Opinion of the honorable Circuit Judge J. Skelly WRIGHT* in *Chisholm*, 358 F.2d at 366~396, and respectfully requests this honorable Court to consider its inescapable logic in its deliberations.

It may may be convenient for Congress to avoid its duties and responsibilities, and it may lessen the load on our overworked courts if the courts simply go along with the fiction that the FCC has the powers to do whatsoever pleases the licensee broadcasters and that the FCC procedures are "fair and adequate" because the FCC evaluates itself and finds itself above and beyond reproach; but:

"... the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives - or the hallmarks - of democratic government..."

I.N.S. v. Chadha, 462 U.S., at 944;
103 S.Ct., at 2781; 77 L.Ed.2d 317 (1983).

Petitioner respectfully suggests that *the workloads and calendars of the courts will be saved from perpetual petitions from Citizens whose rights have been violated* if this Court will courageously do its duty and clearly and unambiguously protect the First Amendment Rights of the People and of individual candidates and viewpoints from the censorship and suppression by bureaucrats and licensees under color of bureaucratic decrees and Orwellian double-think.

The history of the convoluting of the letter and intent of regulation of privileged licensees to abridge the essential right to Freedom of Speech into an unrecognizable mockery is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over the People.

* * *

"As Justice STEVENS observed in *Consolidated Edison Co. v. Public Service Comm'n. of N.Y.*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980), however: 'A regulation of speech that is motivated by nothing more than a desire to curtail ex-

pression of a particular point of view on controversial issues of general interest is the purest example of a "law ... abridging the freedom of speech, or of the press." A regulation that denies one group of persons the right to address a selected audience on "controversial issues of public policy" is plainly such a regulation.' *Id.*, at 546, 100 S.Ct., at 2333-2334 ... '[t]he First Amendment's hostility to content based regulation extends not only to restrictions on certain viewpoints, but also to prohibition of public discussion of an entire topic, *id.*, at 537, 100 S.Ct., at 2333, we must particularly wary in assessing [restrictions of speech] to determine whether it reflects an impermissible attempt 'to allow a government [to] control ... the search for political truth.' *Id.*, at 538, 100 S.Ct., at 2333."

FCC v. League of Women Voters of California, 104 S.Ct. at 3119-3120

* * *

13. THE PUBLIC'S PARAMOUNT RIGHT TO KNOW

"... Congress may ... seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations."

FCC v. League of Women Voters of California, 104 S.Ct. at 3116

"... those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves.' *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 at 389, 89 S.Ct. 1794 at 1806, 23 L.Ed.2d 371 (1969).

"As we observed in *(Red Lion)* because '[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail ... the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences [through the medium of broadcasting] is crucial here [and it] may not be constitutionally abridged either by Congress or by the FCC.'

Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806." 104 S.Ct. at 3116

* * *

There is a "substantial government interest" in ensuring adequate and balanced coverage of public issues.

FCC v. League of Women Voters of California, 104 S.Ct. at 3116

The public has a "First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern." *FCC v. League of Women Voters of California,* 104 S.Ct. at 3117

"Similarly, in *CBS, Inc. v. FCC,* 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d. 706 (1981), the Court upheld the right of access for federal candidates imposed by § 312(a)(7) of the Communications Act both because that provision 'makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process,' *id.,* 453 U.S., at 396, 101 S.Ct., at 2830 ... and of guarding against 'the risk of an enlargement of Government control over the content of broadcast discussion of public issues.' " *Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com.*, 412 U.S. at 123-125, 93 S.Ct. 2080 at 2096-2097 (1973)

"As we recently reiterated in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) 'expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." ' *Id.,* at 913, 102 S.Ct., at 3426 (quoting *Carey v. Brown,* 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 [1980]). And we have emphasized:

> 'The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment ... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'

Thornhill v. Alabama, 310 U.S., at 101-102, 60 S.Ct., at 744.

"'... Debate On Public Issues Should Be Uninhibited, Robust And Wide-Open.' *New York Times Co., v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964)" cited in *FCC v. League of Women Voters of California,* 104 S.Ct. at 3118

* * *

"Congress was, however, cognizant of the fact that the Nation's airwaves are a public resource not subject to private ownership." *Muir* at 1039

"... [T]he People as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion,* 395 U.S. at 390; 89 S.Ct. at 1806.

"[S]peech Concerning Public Affairs . . .
Is The Essence Of Self-Government."
Garrison v. Louisiana, 379 U.S. 64, 74-75; 85 S.Ct. 209, 216; 13 L.Ed.2d 125 (1964)

The First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view. See, e.g., *Thomas v. Collins,* 323 U.S. 516, 537; 65 S.Ct. 315, 325; 89 L.Ed. 430 (1945); *cf,. NAACP v. Button,* 371 U.S. 415, 429-430; 83 S.Ct. 328, 335-337; 9 L.Ed.2d 405 (1963)

[I]t is imperative that we take special care to preserve the vital First Amendment interest in assuring 'self-fulfillment [of expression] for each individual.'
Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96; 92 S.Ct. 2286, 2290; 33 L.Ed.2d 212 (1972)

Even for commercial licensees who have an interest in exercising reasonable journalistic control over the use of their assigned frequencies, nevertheless,

"The Right Of Free Speech Of A Broadcaster . . .
Does Not Embrace A Right To Snuff Out The Free Speech Of Others." {Emphasis added}
Red Lion, 395 U.S., at 387, 89 S.Ct. at 1805.

"No Man In This Country Is So High That He Is Above The Law. *All The Officers Of The Government, From The Highest To The Lowest, Are Creatures Of The Law, And Are Bound To Obey It.*" *U.S. v. Lee*, 106 U.S. 196

Therefore, Right and Justice and the Constitution should not be trampled by trivial technicalities and entangling precedents or bureaucratic interpretations that are merely *Curia Regis,* an unlawful usurpation of the judicial powers conferred by the People to the lawful courts. The People and Plaintiffs and their rights must not be abandoned to the tender mercies of death trap bureaucratic schemes.

It Is A Common Law Maxim That Everyone Shall Have A Remedy For An Injury Done To His Person Or Property.

The common law right to a jury trial is explicitly embodied in the Sixth and Seventh Amendments to the United States Constitution.
Gannett C. v. De Pasquale, 99 S.Ct. 2898; 61 L.Ed.2d 608 (1979)

Under the Federal Rules of Civil Procedure *there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert these rights.* [Italics added]
Rose v. Bernhard, 396 U.S. 531; 90 S.Ct 733; 24 L.Ed.2d 729

The word "legal" as used in statutes, is a term of art; in situations in which "legal" relief is available and "legal" rights are determined, the Seventh Amendment provides a right to jury trial. *Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575; 98 S.Ct. 866; 55 L.Ed.2d 40

A plaintiff may opt for a jury trial in an action founded upon *Bivens v. Six Unknown Fed Narcotics Agents*, 403 U.S. 388; 29 L.Ed.2d 619; 91 S.Ct. 1999, in which it was recognized that in some circumstances the victims of a violation of the Federal Constitution ... have a right to recover damages ... in federal court *despite the absence of any statute conferring such a right.* [Italics added]
Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468; 64 L.Ed.2d 15

The Declaratory Judgment Act (28 USC §§ 2201, 2202) *specifically preserves the right to jury trial.* [Italics added]
Beacon Theatres Inc. v. Westover, 359 U.S. 500; 79 S.Ct. 948; 3 L.Ed.2d 988

Free Speech, Free Of Government Censorship And Discriminatory Trespasses, *Is Irrepealable Law*

"The founders of our government were familiar with the history of the struggle for liberty and they made secure in a written Constitution every right ... Time has proven the discernment of our ancestors; **for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are *now* after the lapse of more than seventy years {or 200 years}, sought to be avoided.**

"Those great and good men foresaw that troublous times would arise ... and that the principles of Constitutional liberty would be in peril, unless established by *irrepealable law*. The history of the world had taught them that what was done in the past *might be attempted in the future*. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of protection *all* classes of men, at *all* times, *and under all circumstances*. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be *suspended* during any of the great exigencies of government {or by innocuously appearing "policy matters"}. Such a doctrine leads directly to anarchy *or despotism* ...

Wicked men, ambitious of power, with hatred of liberty *and contempt of law,* may fill the place once occupied by Washington and Lincoln ... **Our fathers knew that *unlimited* power was especially hazardous to freemen."**
Mr. Justice DAVIS, in *ex parte Milligan*, 4 Wall 2 (118) (1866)

- III - THIS APPEAL IS NOT MOOT

Johnson v. FCC, 829 F.2d. 157 (D.C. Cir. 1987), cited by the State, is another case in which it was found that *notwithstanding the fact the election was over,* challenge of minority party party presidential and vice-presidential candidates to

their exclusion from televised debates was not moot, *as it was case where controversy was capable of repetition yet evading review.* See also *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 at 125

This case, *Johnson,* took strongly into consideration [1] the Fairness Doctrine, *which the FCC has since revoked;* and [2] the fact that in this case *the sponsor was not a broadcaster,* but a third party; thus, this case also upholds Petitioners and vanquishes the State's defense.

Throughout all the cognate lines of cases, the courts have reiterated over and over again *the necessity of "case-by-case inquiry"* because of the inherent complexity of balancing rights as the courts attempt to "walk the tightrope" *"in the light of the particular circumstances of each case."* {Italics added}

e.g., Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 93 S.Ct. 2080 at 2121 (1973)
FCC v. League of Women Voters of California, 104 S.Ct. 3106

> 'We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.' *Hearings on H.R. 7357 before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess., 8 (1924).*

"That statement foreshadowed the 'tightrope' aspects of Government regulation of the broadcast media, a problem the Congress, the Commission, and the courts have struggled with ever since...

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2087-88, 412 U.S. at 105

* * *

And while strangling the First Amendment with the frayed remnants of this tightrope, the ... Defendants have the effrontery to argue that these twin evils are "justified" by the very tightrope balancing act that was developed *to prevent this evil misuse of the people's airwaves.*

No matter how well intentioned and reasoned; based on facts *that no longer exist* {*i.e.*, the FCC's broken promise of perpetuating the Fairness Doctrine}, petitioner contends that the overall effect of the trend of the decisions, accelerated by a voracious interpretation by broadcasters and certain persons in the FCC, is that we are rapidly sliding down a slippery slope to a point of no return, in which the People and individual Citizens will have no rights; so it is the imperative duty of the Court to wield the constitutional lifeline to save the American People from falling to their doom.

B. This case is not moot, also, because patently preposterous denials of Free Speech and Equality before the law is subversive of public respect for the courts, and the Supreme Court now gives this factor great weight. The public's confidence in the courts to preserve a constitutional Republic will be undermined, if the People in their common sense and instinctive sense of justice and fairness perceive the Court to be swallowing camels while choking on gnats: If the burning of American Flags, the imagery of religious symbols immersed in urine, etc., are expressions protected by the First Amendment; **then *why* may (defendants) deny the People their right to hear the only popularly enfranchised candidate for U.S. Congress ...?**

* * *

"The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to desire what it demands.

"... Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

"... If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern for legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible."

Opinion of Supreme Court of The United States in Planned Parenthood of Southeastern Pennsylvania, et al., v. Casey, Governor of Pennsylvania, et al., No.s 91-744 & 91-90, at 23-24, 26

* * *

- IV - THE INESCAPABLE CONCLUSION

WHEREFORE, BECAUSE [1] The Constitution is the Supreme Contract it is Controlling, and [2] The Rights of The People are Paramount, [3] the Constitution may not be overruled; nor the Rights of the People be abridged, nor Denied by Any Rule or Precedent ...

And, [4] because *DeYoung,* and all of the precedents cited by ... Defendants to abridge First Amendment Rights, have been *factually* and *de jure* reversed, and fatally invalidated by the FCC's own unilateral reversal of the Fairness Doctrine;

And, [5] because of prohibited ... Prejudice and Hostility;

And, [6] because there is no effective "comprehensive administrative scheme" to protect the federal rights conferred by 47 USC 315;

And, [7] because The Scales of Justice have been Unbalanced by the deprivation of: (A) The Fairness Doctrine; (B) Unrestricted access to buy time; (C) And, alternate means of presenting views;

And, [8] because the Abridgement of First Amendment Rights by Congress, the FCC, Commercial Licensees, the Courts, the AETN Defendants, or Anyone is *prima facie* Unconstitutional;

And, [9] because the FCC Interpretations used by the ... Defendants are *prima facially* Unconstitutionally Broad, Vague; and, [10] Unconstitutionally Applied in this instance;

And, [11] because the FCC's Claimed Powers are Violative of The Fundamental Principle of Separation of Powers;

And, [12] because the FCC Claims to Power are Unconstitutional;

* * *

And, [16] because of the Public's Paramount Right to

Know ... (all rules) that abridge the rights protected by the First Amendment must be overruled;

And, [17] because it is far past time to reverse the menacing trend of diluting, giving up and losing fundamental rights. It is time to reverse and right the wrongs that violates and perverts the *inviolate* Law of the Land; and have eroded and dissipated our most basic rights to the point where state officials (and privileged licensees with affirmative fiduciary duties) may contemptuously deny the People their right to be informed, to censor the viewpoints and ideas of a popularly nominated candidate and blatantly discriminate against persons, ideas and classes they oppose.

This Appeal is Not Moot because [1] *it is a case where controversy is capable of, and doomed to repetition, yet evading review.*

And this case is not moot because [2] the public's confidence in the courts to preserve a constitutional Republic will be undermined if the protections commonly understood to be be afforded by the First and Fourteenth Amendments are abridged by the courts.

Therefore, for each and all of the foregoing reasons *DeYoung* (and the December 16, 1992, order of the district court) must be reversed as to any effects that abridge rights secured by the First Amendment and/or deprives or denies any person the equal protections of the laws;

And this honorable Court has the imperative, affirmative duty to correct the course ~ to prevent our ship of state from sailing off the guarded course of a popular Republic under law into harms way, the hazardous deadly seas of an imperial, totalitarian statism ~ by fashioning appropriate and effective remedy;

Wherefore, appropriate and effective remedy to prevent further damage to the People, to the Republic, to the Constitution, to Petitioner Forbes and to all other candidates who may come after is required from this honorable Court.

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes, Plaintiff
In his own proper person,

Box 88
London, AR 72847
501/293-4641

AFFIDAVIT OF VERIFICATION OF FACT

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this s/ 7 Day of s/ December, 1992.
My Commission expires June 30, 1996.

s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, Ralph P. Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 16 th Day of December, 1992, by U.S. mails.

Mr. Thomas S. Gay, #77053
Senior Assistant
Attorney General
For AETN State Defendants
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APPENDIX V

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 93 -1031 -WA

Ralph P. Forbes And The People
Appellants,
v.
Arkansas Educational Television Communications Network Foundation, Et Al.,
Appellees.

On Appeal from the United States District Court for the Western District of Arkansas

APPEAL FROM "ORDER TO DISMISS"

> **"Those then, who controvert this principle, that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.**
>
> **"This doctrine would subvert the very foundation of all written constitutions."**
>
> *Marbury v. Madison*, 5 U.S. 137 at 176, 1 Cranch 37, 163, 2 L.Ed. 60 (1803)

* * *

May it please the Court, comes Ralph P. Forbes plaintiff/appellant and appeals from the Order of the United States District Court, Western District of Arkansas, Fort Smith Division, Civil No. 92-2190, dated December 16, 1992, for each and all of the following reasons and for each and all of the reasons in petitioner's separate *Brief* re the unconstitutional results of *DeYoung v. Patten,* 898 F.2d 628 (8th Cir. 1990)

1.

The District Court Did Not Have Jurisdiction To Dismiss.

"This case [92-3374WAFS] is before us on petition for rehearing." The Order and Opinion, of the Eighth Circuit Court, remanding the case back to the district court to "determine the case and enter final judgment," was not issued until December 22, 1992, *six days after* the district court's "final order."

This over eagerness to dismiss by the district court is more than a matter of comity. The jurisdiction of the Circuit Court precluded and preempted the untimely order. Courts have found both election law and FCC questions not moot, because capable of review. e.g., *Johnson v. F.C.C.*, 829 F.2d 157 (D.C. Cir. 1987). This premature dismissal would have been a procedural predicament if some meaningful relief could have been fashioned, or if *DeYoung* had been reversed. The district court erred in disregarding plaintiff's answer to motion to dismiss pointing out that the case had been removed to the Clerk of Court for the Eastern District of Arkansas *and the case was before the 8th Circuit Court.*

The premature order dismissing the case with prejudice was predicated on the district court's analysis that "*DeYoung* was binding precedent and dispositive of the matter." Contrary to this, the 8th Circuit Court's Order of December 22, 1992, a week *after* the order appealed from, instructed the district court to "vacate its order, denying preliminary injunctive relief on the merits, and to enter a new order, denying the motion for preliminary injunction as moot."

Because "The underlying case is not moot."

If these instructions to the court below have been followed plaintiff has not received copies of the order to vacate nor the new order.

* * *

Plaintiff appealed immediately. Plaintiff is still recovering from the costs of the campaign, and unfortunately was compelled to apply for leave to proceed in forma pauperis. The district court denied petition on grounds this appeal was "not taken in good faith."

Where indigent plaintiff inmate presented nonfrivolous claim, denial of in forma pauperis status or similar relief for no apparent reason rendered otherwise adequate postdeprivation remedy inadequate, so that inmate should be permitted

to pursue 42 USC § 1983 action on merits.
Williams v. St. Louis County, (1987, CA8 Mo) 812 F.2d 1079
Jones v. Morris, (1985, CA7 Ill) 777 F.2d 1277
Johnson v. Kempf, (1986, CA11 GA) 781 F.2d 1570
Nilsson v. Coughlin, (1987, SD NY) 670 F.Supp. 1186

2. All the reasons the court below gave for dismissal in its five page, single spaced letter to the parties, dated December 16, 1992, were erroneous.

Petitioner requested an opinion of the court with his notice of appeal:

"PLEASE TAKE NOTICE Plaintiffs in the above styled matter intend to appeal the Order of December 16, 1992. Pursuant to the right to appeal and due process Petitioner-in-chief requires a particular and sufficient *finding of fact and conclusion of law* from Judge H. Franklin Waters."

No such particular and sufficient finding of fact and conclusion of law has been provided. All that petitioner has to base his appeal on is this somewhat vague, conclusory, five page rationalization, which apparently is meant to be a *de facto* opinion. It is a veritable Procrustean bed on which plaintiff's cause must fit the prejudged doom; if the law or the facts are too short, stretch them, if they are too long, chop them off. Petitioner does not know if this letter has the force of law, but he believes he has no choice but to first point out the various misconceptions and errors in the letter, *leading up to the crux of the matter on which all decisions and appeals must ultimately be decided.*

3. The court below erred when it failed to liberally construe the pleadings.

* * *

Pro Se complaints, according to the Supreme Court, are held "to less stringent standards than formal pleadings by lawyers..."
Haines v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594
Rehearing Denied 405 U.S. 948, 30 L.Ed.2d 918, 92 S.Ct. 963

"The election is approximately two weeks from the filing of this case. Plaintiff Forbes is campaigning night and day. But the blatant transgression against the people and Forbes by AETN has left Plaintiff Forbes *no option but to turn to this court to protect his rights, the rights of the voters and the integrity of the electoral process.*"

(Original "Emergency Complaint Against Bureaucrats & Politicians," p.2)

Former congressional candidate presented a justiciable claim under 42 USC 1985(3) where it was alleged that state agents violated his constitutional rights to engage in political activities and the rights of voters within plaintiff's district to exercise their electoral rights without being target of deceptive or illegal practices by governmental agents.

Lowenstein v. Rooney, (1975, ED NY) 401 F.Supp. 952, 21 FR Serv 2d 12

In his Answer to the Motions to Dismiss, Petitioner Forbes averred he is:

[4.] ... a layman untrained in law who was forced to take invaluable time in the midst of a political campaign and work around the clock to prepare the first version of the pleadings, *which of necessity were not in a final version;* prepare appeals for a one judge hearing, a three judge panel and the appellate court *en banc.* And prepare a second version of the pleadings *under emergency conditions* in which priceless rights needed to be protected under powerful and limited time constraints.

5. It was the actions of the Defendants that are the *casus belli* that necessitated this complaint. Time was of the essence of prevent irreparable injury, therefore it was the actions of the AETN and KHBS-TV Defendants that forced Plaintiff Forbes to take immediate, *even if incomplete, defensive process in order to prevent the irreversible ravagingof the innumerable, priceless rights endangered by the Defendants.*

6. Plaintiffs have cause of action pursuant to the United States Constitution Article I. Section 2; Article III, Section 2; Article IV, Section 4; Article VI; And Amendments I, VII, IX, X and IVX, thereto; *42 USC 1981*, et seq.

7. Plaintiff exhausted all reasonable and lawful administrative remedies. Moreover, important constitutional questions re these so-called administrative remedies are *presently* before the appellate court.

Under Fed.R.Civ.P. 8, technical niceties of pleading are not required. Rather a short and plain summary of the facts sufficient to give fair notice of the claim asserted is sufficient.
Conley v. Gibson, 355 U.S. 41,47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)

"... the district court had no jurisdiction to dismiss case for failure to state a cause of action *** without hearing the plaintiffs ***."

Gutensohn v. Kansas City Southern Ry.Co.,
140 F.2d 950, 933 (8th Cir. 1944)

In 42 USCS §§ 1983 cases involving alleged violation of express substantive constitutional right, it is only necessary to allege that there was a deprivation of constitutional right under color of law ... (general rule)

Pro se plaintiff who does not refer to 42 USCS §§ 1983 in complaint, who mentions Fourteenth Amendment only briefly, and who relies exclusively on Title VII (42 USCS §2000e et seq.) on appeal should nonetheless be allowed opportunity to pursue claim under § 1983 and Fourteenth Amendment where, liberally construed, complaint does state claim for relief.

Haddock v. Board of Dental Examiners, (1985 CA9 Cal) 777 F.2d 462, 39 BNA FEP Cas 764.
Radcliff v. Landau, (1989, CA9 Cal) 883 F.2d 1481, clarified (CA 9) 1989 U.S. Ap LEXIS 17364
Cahill v. Carroll, (1988, ED Pa) 695 F.Supp. 836
Grattan v. Burnett, (1983, CA4 Md) 710 F.2d 160
Rubin v. O'Koren, (1980, CA5 Ala) 621 F.2d 114

Complaint by pro se plaintiff should have expansive reading and be held to less stringent standard than pleadings drafted by attorneys.

Cruz v. Cardwell, (1973, CA8 Mo) 486 F.2d 550
Byrd v. Stewart, (1987, CA11 Ga) 811 F.2d 554
Baily v. Wictzack, (1990, MD Fla) 735 F.Supp. 1016

Nance v. Kelly, (1990, CA2 NY) 912 F.2d 605

Any plaintiff who can allege deprivation of federal right by reason of action under color of law can maintain action under this sub-chapter.

Nationwide Amusements, Inc. v. Nattin, (1971, DC La) 325 F.Supp. 95

"The court cannot know, without hearing the parties, whether it may be possible for appellant to state a claim entitling him to relief, however strongly it may incline to the belief that he cannot *** The right to a hearing on the merits of a claim over which the court has jurisdiction is of the essence of our judicial system, and the judge's feeling that the case is probably frivolous does not justify by-passing that right."

Harmon v. Superior Court, 307 F.2d 796 (1962)
Addison v. The Grand Lodge of International Association of Machinists, 300 F.2d 863 (9 Cir. 1962)
Russell v. United States, 306 F.2d 402 (9 Cir. 1962)

This section making any person who, under color of law deprives U.S. Citizen of constitutional rights, liable to injured party is to be construed liberally.

Nanez v. Ritger, (1969, DC Wis) 304 F.Supp. 354

Pleadings should be construed liberally in favor of the pleader. The theory of the complaint is to be determined by its main and material allegations. A pleading is judged by its substance and not its form. Actions erroneously brought under inappropriate law may be transferred.

United States v. White County Bridge Commission, 275 F.2d 529 (7th Cir. 1960)

If a very flawed complaint in a civil action for maintenance of a bridge instituted by the United States Attorney can be restored and won by appellate reconstruction, then surely a pro se complaint alleging violations striking at the heart of the most precious, vital and fundamental constitutional rights must not be strangled by a narrow bias against petitioner and his cause.

4. The court below erred when it failed to recognize that "42 USC 1981, *et seq.*," were intended to mean §§

1983 and 1985 allegations

"et seq. = Latin *et sequens* = and the following; Latin *et sequentes, et sequentia* = and those following;"
The American College Dictionary, Random House, 1969 ed.

Plaintiff, because of failure to enforce his rights by either the AETN defendants or the FCC "administrative protectors," was forced to write his original complaint during the week end of October 17-18th. Because of the demands of his campaign, etc., he was forced to "wing it," to work around the clock, without benefit of research, law library, etc. Plaintiff knew that the statutes he invoked were "somewhere" in the so-called "Reconstruction," or "Ku Klux Klan" or "Civil Rights" acts aka "1981, et seq." Clearly, the pleadings did not allege racial discrimination, but violations under color of law {§ 1983}; and violations which are protected against even private conspiracies {§ 1985}. At all times plaintiff made it clear that he needed an opportunity to amend complaint.

The court below should have measured the Complaint against the appropriate sections, rather than "1981."

Or, in the alternative, if a strict, narrow reading is held; the prejudice against pleading should not be bar to new action against defendants for same violations and injuries under applicable statutes.

Denial of leave to amend complaint to allege violation of § 1983 rather than § 1985 was error. It should have been granted, not withstanding unjustified delay, where rejection of amendment would preclude plaintiff from being heard on merits on facts which were well known to all parties and which were pleaded at outset although relief was erroneously sought under § 1985, and defendant would only be lightly prejudiced.

Moore v. Paducah, (1986, CA6 KY) 790 F.2d 557
White v. Bond, (1983, CA8 Mo) 720 F.2d 1002
Gordon v. Leeke, (1978, CA4 SC) 574 F.2d 1147, cert den 439 U.S. 970, 58 L.Ed2d 431, 99 S.Ct 464
Triplett v. Leflore County, (1983, CA10 Okla) 712 F.2d 444, 36 FR Serv 2d 1257

Lundt v. Hodges, (1985, ND Iowa) 627 F.Supp. 373
United States v. ex rel. Smith v. Heil,
(1970, ED Pa) 308 F.Supp. 1063
Richmond v. McElyea, (1990, ED Tenn) 130 FRD 377

5. The Court Below Erred When It Failed To Grant Leave And Sufficient And Ample Time For Plaintiff To Amend The Pleadings.

"10. Plaintiff Forbes apologizes to the court for the hasty manner in which this complaint had to be prepared, and *he begs leave to amend this pleading* by being more particular in the multitude of invasions of rights by the defendants and the continuing violations of *42 U.S.C. 1981*, et seq."

{Original "Emergency Complaint Against Bureaucrats & Politicians," pp.4-5}

"This Complaint embraces and must comprehend a long string of abuses and *pattern of continuing conspiracy against the people and their rights*. The instant case against KHBS-TV, et al, as more fully shown is further proof of the arrogance and malice of this wicked conspiracy against the people and their inherent rights to choose their own representatives based upon their informed consent. And therefore, Petitioner Forbes requires at least thirty (30) days past the election of November 3rd to adequately prepare his pleadings and he stipulates that no defendant is required to answer the complaint until after they have received *the fully amended pleadings;*"

{Amended Complaint, emergency addition of KHOG Defendants, p. 7}

"1. The Motions to dismiss are premature because *the Complaint itself has not been amended to include all of the Plaintiffs and Defendants and causes of Action* as stated in the emergency pleadings and in the supplementary emergency pleadings joining the KHBS-TV Defendants."

Plaintiff's Answer to Motion to Dismiss

Dismissals should not be applied so as to subvert *liberal policy favoring amendment of complaints as expressed in FRCivP Rule 15(a)*, and consideration should be given for im-

portant policies that pro se litigants not be denied opportunity to state civil rights claims because of technicalities, and that litigation where possible should be decided on merits.

Kaufman v. Moss, (1973, CA3 Pa) 420 F.2d 1270, cert den 400 U.S. 846, 27 L.Ed2d 84, 91 S.Ct 93

University graduate student who brought pro se 42 USCS § 1983 claim alleging sex discrimination by university should be fairly freely afforded opportunity to amend complaint, *even if request was made after court entered judgment dismissing original complaint.*

Bobal v. Rensselaer Polytechnic Inst., (1990, CA2 NY) 916 F.2d 759, 16 FR Serv 3d 431, amd, on reh (CA2) 1990 U.S. App LEXIS 18658

District Court abused its discretion in dismissing sua sponte group of 42 USC § 1983 claims against police officers in their official capacities without giving plaintiffs opportunity to amend complaints.

Perez v. Ortiz (1988, CA2 Conn) 849 F.2d 793
Lundt v. Hodges, (1985, ND Iowa) 627 F.Supp. 373
Salahuddin v. Cuomo, (1988, CA2 NY) 861 F.2d 40
Cunningham v. Ward, (1976, CA2 NY) 546 F.2d 481

Second amended complaint will not be dismissed pending leave to amend.

Del Signore v. McKeesport, (1988, WD PA) 680 F.Supp. 200
Partridge v. Two Unknown Police Officers, (1986 CA5 Tex) 791 F.2d 1182

Denying §1983 plaintiffs leave to amend complaint was error.

Stevens v. Gay, (1986, CA 11 Ga) 792 F.2d 1000
Rose v. Bartle, (1989, CA3 Pa) 871 F.2d 331
Hill v. Shelander, (1991, CA7 Ill) 924 F.2d 1370, reh den, en banc (CA7) 1991 U.S. App LEXIS 4798

Letter by pro se inmate to judge in 42 USCS § 1983 action should have been broadly construed as as amendment to complaint.

Pearson v. Gatto, (1991, CA7 Ill) 933 F.2d 521
Haley v. Dormire, (1988, CA8 Mo) 845 F.2d 1488

Leave to amend complaint should be freely given when justice requires, particularly in case of pro se civil rights plaintiff who has not had benefits of discovery.

Mathis v. Clerk of First Dept., Appellate Div. (1986, SD NY) 631 F.Supp. 232

Plaintiff will be allowed to amend her complaint to, inter alia, add claim under 42 USC 1983 and to increase *ad damnum* clause, despite plaintiff's delay of three months between the time she filed her complaint and time she moved to amend.

Gordon v. New York State Dormitory Authority, (1983, SD NY) 565 F.Supp. 143

6. The Court Below Erred When It Failed To Apprehend The Claims And Differentiate Among Named And Unnamed Defendants

The Complaint which alleges: "*a systematic and general conspiracy* by the Defendants, under color of law, to deny the Plaintiffs and all American Citizens their basic Constitutional Rights by unlawfully changing this constitutional Republic of Law into a soviet-like dictatorship in which *party bosses, bureaucrats, and powerful special interests* shall alone have the power to decide who may or may not run for elective office; and to deny the American People their fundamental Rights protected by the First Amendment by censoring ideas and opinions that do not conform their own plans a for post-American 'new world order.' "

... Uses phrases such as "The Defendants have continuously conspired to deprive ...;" and, "Certain of the defendants conspired" to show that unknown and named defendants acted individually, together and with others to deprive plaintiffs of their rights to constitutional government in a general pattern of deprivations over the years sufficiently alleges conspiracy. *Kwoun v. SE Missouri Professional Standards Review Organization,* (1985, ED Mo) 632 F.Supp. 520, later proceeding (ED Mo) 632 F.Supp. 1091, affd (CA8 Mo) 811 F.2d 401, cert den (US) 100 L.Ed2d 226, 108 S.Ct. 1994

The style of the case, which described unnamed defendants as "Crooked Lying Politicians," the "Special Interests,"

and certain Media 'Personalities' and the Orwellian Bureaucrats of AETN and Governor Clinton, as a necessary party, in which the AETN defendants were specifically named for their discriminatory exclusion of plaintiff, should have made it self evident that the charges of massive, discriminatory targeted, illegal closings of polling places required by law to be open in 1990, were not alleged against AETN defendants, but certain unnamed "crooked lying politicians."

Petitioner's colorful appellations made in the heat and immediate threat against his most precious and vital rights should not be used to demean or negate the seriousness of the charge.

"The Sixth Circuit has held, and we agree, that the right to cast a ballot in a state election is also protected from interference from private conspiracies by the federal Constitution. *Cameron v. Brock,* 473 F.2d 608, 610 (6th Cir. 1973); see also *Reynolds v. Sims,* 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Smith v. Cherry,* 489 F.2d 1098, 1100-1101 (7th Cir. 1973)."

Means v. Wilson, 522 F.2d at 838 (8th Cir. 1975)

7. The court below erred when it failed to *sua sponte* protect the rights of plaintiff, the people and the substantive constitutional questions raised.

Rules of court are procedural and should not be construed to impair the rights of litigants as to substantive rights and law.

28 USC 2072

The court below should have been perpetually protective of pro se litigant's rights, and to be on guard to forewarn him of any procedural or technical errors by him that would place the basic relief prayed in his case in jeopardy.

"It is the duty of the courts to be watchful for the ... rights of citizen, and against any stealthy encroachments thereof. Their motto should be *obsta principiis*."

Hale v. Henkle, 201 U.S. 43 at 88

Boyd v. US, 116 U.S. at 635

Black's Law Dictionary defines the Latin motto, *obsta principiis,* to mean to "Withstand at the beginning; resist the first approaches or encroachments."

{2nd Edition, 1910, at 845; 5th Edition, 1979, at 972}

Dismissal with prejudice of pro se 42 USC § 1983 action was abuse of discretion, and written notice of dismissal on merits should have been given before case was dismissed.

Palmer v. Decatur, (1987, CA7 Ill) 814 F.2d 426
Elliott v. Bronson, (1989, CA2 Conn) 872 F.2d 20
Reynolds v. Shillinger, (1990, CA10 Wy) 907 F.2d 258

District Court improperly dismissed complaint of pro se plaintiff under 42 USC 1983 where plaintiff had twice amended complaint on his own initiative, where court did not advise plaintiff in what respects second amended complaint was deficient, nor did court allow plaintiff leave to amend, and where it was not absolutely clear that plaintiff could not amend complaint to allege constitutional violations.

Noll v. Carlson, (1987, CA9 Cal) 809 F.2d 1446
Karim-Panahi v. Los Angeles Police Dept., (1988, CA9 Cal) 839 F.2d 621

District court must be sensitive to problems of pro se plaintiff in civil rights actions and not too quick to dismiss complaint for failure to state technical cause of action.

Martin v. Wainwright, (1976, CA5 Fla) 526 F.2d 938

8. The Court Below Erred When It Said, "Forbes['] Right To Participate In Televised Debates And Air Political Advertisements Stems *Entirely From ... 47 U.S.C. § 315(a)*"

"The privileges and immunities of citizens of the United States, protected by the XIVth Amendment, are those arising out of the essential character of the federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to the arbitrary exercise of the powers of government."

Duncan v. Missouri, 152 U.S. 382

Plaintiff's rights arise from and are rooted in God-given, inherent, natural, indefeasible rights protected by the United States Constitution, Amendments I & XIV, et seq.

The defendants' duties stem in part from the equal time provision of the Federal Communications Act as well as in in numerous other provisions cited by plaintiff in his submissions.

In addition to § 315 KHOG defendants are implicated by Section 312(a)(7) of the Communications Act of 1934, strong case law, *CBS v. FCC*, etc., and FCC regulations.

9. THE CRUX OF THE MATTER: The court below erred when it said, the FCC has broad remedial power, and "Forbes' sole remedy ... lies solely within the administrative powers of the FCC."

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

Marbury v. Madison, 1 Cranch 37, 163,
5 U.S. 137, 2 L.Ed. 60 (1803)

"Everyone shall have a remedy for an injury done to his person or property." Maxim of Common Law

"The cooperation and help of laymen, as well as of lawyers, is necessary if the right of reasonable access to the courts is to be available to the indigent among us. *Reasonable access to the courts is a right {secured by the Constitution and the laws of the United States}, being guaranteed as against state action by the due process clause of the fourteenth amendment.*"

Justice DOUGLAS in *Johnson v. Avery*, 393 U.S. 483, 498

Additional Jurisdiction

In addition to remedies provided by *§§ 1983 and 1985 of Title 42:*

. . . 28 USC § 1331(a) . . . 28 USC 1343

* * *

As more fully shown in petitioner's separate *Brief*, the FCC's "comprehensive enforcement mechanism for protection of a federal right," is a mere chimera, a sham, a mockery that fails to protect asserted rights and serves as a cloak to destroy those same rights under color of law. Plaintiff did everything he could to protect his rights through the FCC. His rights were abrogated, and he suffered great harm because the FCC "comprehensive enforcement mechanism" is a worthless prophylactic, unwholesome snake oil. Like *Means*, plaintiff Forbes sought relief [through ... channels] and was denied an effective timely remedy.

"* * * We express no view of whether exhaustion of tribal remedies is a prerequisite of federal relief ... because we find that the plaintiffs made every reasonable attempt to exhaust their ... remedies. . . We find that plaintiffs have done all they could to exhaust ... remedies in this case, but their right ... has been frustrated by inaction ... 'The plaintiffs sought relief [through ... channels] and were denied an effective timely remedy.' *Brown v. United States,* 486 F.2d 658, 661 (8th Cir. 1973).

Means v. Wilson, 522 F.2d 833 at 837 (8th Cir. 1975)

* * *

The FCC would not or could not protect plaintiff's rights. Now that the irreparable harm has been done, the FCC is powerless to restore, in the words of the 8th Circuit Order of December 22, 1992, "relief with respect to it to have any meaning." But, unlike the Court, the FCC is powerless to compensate the plaintiff with remedial, compensatory and exemplary damages. The FCC has no remedy. Contrary to the words of the district court below: Forbes' sole remedy ... lies solely within the courts, not the administrative powers of the FCC.

Proof that Congress intended for persons harmed by failure to protect rights to exercise their rights to seek judicial remedy is the fact that no hint of remedial redress by the FCC can be found. Moreover, if Congress attempted to remove the protection of basic, substantive rights protected by the Constitution beyond the aegis of the judicial shield, it would be unconstitutional. Please see Plaintiff's separate *Brief* and excerpts from *Wong Yang Sung v. McGrath*, 70 S.Ct. 445, 339 U.S. 33, *infra*.

10. The Courts Have Power To Redress The Wrongs In This Case

The Fourteenth Amendment authorizes Congress to reach purely private conduct. "Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and *political* equality for all citizens * * *"

United States v. Guest, 383 U.S. 745, 782-784
86 S.Ct. 1170, 1191-1192, 16 L.Ed.2d 239
Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971)
Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971)
Scott v. Moore, 640 F.2d 708 (1981) at 725

* * *

The district court found it had jurisdiction pursuant to 42 USC §§ 1981, 1982, 1983 and 1985(3), and their accompanying jurisdictional statutes, 28 USC §§ 1343(1), 1343(3) and 1343(4). The Eighth Circuit, *En Banc,* found that the District Court had jurisdiction under 1985(3) and, therefore, did not address the applicability of the other sections.*

Action v. Gannon, 450 F.2d at 1229 (8th Cir. 1971)

*In 1975 the Eighth Circuit said "28 U.S.C. § 1343 is the statute which actually gives the court jurisdiction to redress violations of the substantive statutes named."

Means v. Wilson, 522 F.2d at 837, (8th Cir. 1975) n.2.

The Eighth Circuit, *En Banc,* ruled [1] that 42 USC § 1985(3) gave the court jurisdiction over the conspiracy; and [2] the constitution provided the court with its source of power to encompass the conspiracy under §§ 1 and 5 of the Fourteenth Amendment. *Action v. Gannon*, 450 F.2d at 1231-1233, including footnote 8, (8th Cir. 1971)

Plaintiff incorporates herein, the discussion and reasoning of the court at 1231-1238 in *Action v. Gannon*, upholding the sufficiency and constitutionality of this case.

"* * * It is thus apparent that the right to vote in federal

elections is a right of national citizenship protected from conspiratorial interference by 42 U.S.C. § 1985(3)."

Means v. Wilson, 522 F.2d 833 at 838 (8th Cir. 1975) citing;
Griffin v. Breckenridge, 403 U.S. 88, 106;
91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)
United States v. Classic, 313 U.S. 299, 314-315,
61 S.Ct. 1031, 85 L.Ed. 1368 (1941)
Ex Parte Yarbrough, 110 U.S. 651, 658-662,
4 S.Ct. 152, 28 L.Ed. 274 (1884)

"Today we hold that 42 USC § 1985(3) protects the right to vote in ... elections against interference from private conspiracies as well.

"Since the right to vote in a system of representative government is one of the essential trappings of citizenship protected by the Constitution, we hold that Congress has necessarily granted it to the plaintiffs, and in a proper case, interference with the right to vote ... may be vindicated under 42 U.S.C. § 1985(3) as a deprivation of equal protection of the laws or equal privileges and immunities under the law."

Means v. Wilson, 522 F.2d 833 at 839 (8th Cir. 1975)

11. "IMPLIED" PRIVATE CAUSE OF ACTION IS *NOT* REQUIRED

"* * * *Federal courts have the power to afford all remedies necessary to the vindication of federal substantive rights* defined in statutory and constitutional provisions except where Congress has *explicitly* indicated that such remedy is not available."

Brewer v. Hoxie School District No. 46, 238 F.2d 91 at 98 (8th Cir. 1956) {Emphasis supplied by Plaintiff.}

There is no explicit language in Title 47, nor Title 42, to preclude the District Court from presiding over trial to protect constitutional rights pleaded.

* * *

12. FREEDOM OF SPEECH & EQUAL RIGHTS

"...[T]he Court has made it abundantly clear that First Amendment rights are protected by § 1 of the Fourteenth Amendment." See n.9.

Action v. Gannon, 450 F.2d at 1234 (8th Cir. 1971)

n.9. See, for instance, *New York Times v. Sullivan,* 376 U.S. 254, 276, 77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686 (1964), and the cases cited therein; *Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293, 81 S.Ct. 1333, 6 L.ED.2D 301 (1961); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, (1960); *Staub v. Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed 1213 (1940); *Lovell v. Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *DeJonge v. Oregon,* 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937); *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

Paraphrasing the Court: Plaintiff Forbes has a right to express the views of himself and the classes he represents, equally with others, free of censorship, prior restraint, discrimination and other abridgements, infringements and trespasses. "The fact that the ... opinions may be offensive to the (defendants) does not render them outside the protection of the First Amendment." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *Bachellar v. Maryland,* 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970); *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). As the Supreme Court has said:

"* * * [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute * * * is nevertheless protected against censorship or punishment, unless shown likely to present a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. * * *"

Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949).

Action v. Gannon, 450 F.2d at 1232 (8th Cir. 1971)

"[T]he Supreme Court has characterized the right of free association as 'a right which, like free speech, lies at the foundation of a free society.' *Shelton v. Tucker,* 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed.2d 231, 236, (1960). Our legal system honors the freedom of the individual to associate as he chooses because that freedom 'tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.' *Gilmore v. City of Mobile,* 417 U.S. 556, 577, 94 S.Ct. 2416, 2427, 41 L.Ed.2d 304, 321, (1974). The importance of freedom of association has led the court to call it one of the 'indispensable liberties,' *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958), which ranks 'among our most precious freedoms.' *Williams v. Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968). The right of association is fundamental in our constitutional scheme of values."

Scott v. Moore, 640 F.2d 708 (1981) at 722

The invasions against plaintiffs are in violation of express constitutional rights embracing *every* facet of the First Amendment, speech, all basic political rights, association and assembly, petition and the redress of grievances, even the free exercise and establishment of a "politically correct" state religion; both the Equal Protections and Due Process provisions of the Fourteenth Amendment; and in violation, at least of 42 USC §§ 1983 and 1985; and 47 USC §§ 312 and 315.

While, it is true that Congress has not expressly provided remedy for injuries caused by violation of 47 USC §§ 312 and 315, *this court and the Supreme Court have ruled that it is not necessary*. It is clear that every person is entitled to a remedy at law; and that the Courts have a duty to help fashion such remedies.

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty - indeed they are under a solemn duty - to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a

statute (or regulation, or interpretation thereof) purporting to have been enacted to protect the public health, the public morals, or the public safety (or the public's right to know) has no real or substantial relation to *(or defeats)* those objects, *or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*"

Mugler v. Kansas, 123 U.S. 623, 662 (Italics supplied.)

13. CURING "THE FUNDAMENTAL ADMINISTRATIVE EVIL"

In respect to Defendants' hiding behind the "interpretations" and "procedures" of the FCC, Petitioner respectfully calls this honorable Court's attention to the following principles enunciated by the Supreme Court:

"Multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the past half century. ... The conviction developed, particularly within the legal profession, that this power was not sufficiently safeguarded and sometimes was was put to arbitrary and biased use.

"Concern over administrative impartiality and response to growing discontent was reflected in Congress ... Fears and dissatisfaction increased as tribunals grew in number and jurisdiction *** The Executive Branch of the Federal Government also became concerned as to whether the structure and procedure of these bodies was conducive to fairness in the administrative process. (at 448, 36-38)

"More fundamental, however, was the purpose to curtail and change the practice of embodying in one person *or agency* the duties of prosecutor and judge. (The "fundamental" "administrative evil ... to be cured" was the carrying on of) judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influence properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render es-

cape from these subversive influences impossible.

" 'Furthermore, the same men are obliged to serve both as prosecutors and judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings of the commission, in the role of prosecutor, presented to itself.' {at 70 S.Ct. 450, 339 U.S. 41-42}

"*** And the Attorney General's Committee on Administrative Procedure ... was unanimous that this evil existed. Its Final Report said: 'These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable ...' {70 S.Ct. at 451, 339 U.S. 44}

"*** The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body." {70 S.Ct. at 454, 339 U.S. 49}

Wong Yang Sung v. McGrath, 70 S.Ct. 445, 339 U.S. 33

This case involved the procedural rights of illegal aliens. How much more should the courts protect the most essential, substantive, inherent, indefeasible rights of the individual Citizen and the Nation, all the People.

As evil as it was, a procedure was established whereby non-citizens could attempt to find justice. But in the instant case, Congress has not provided an administrative or quasi-judicial remedy to afford compensation and restitution for persons whose First and Fourteenth Amendment protected rights have been violated.

Neither the FCC bureaucrats nor the FCC licensed defendants take an oath to uphold the Constitution. Unlike the federal judiciary who are made relatively independent and free from political and other pressures by the immunities of life time tenure and salaries that may not be lowered if they make decisions that would displease powerful interests; the FCC and its agents are twisted and torn by some of the wealthiest and most powerful special interests in the country. The electorate is outraged by the revolving door in which the regulators regu-

late the public in the interests of that which they are supposed to regulate. Plaintiffs' substantive, most fundamental rights are abolished under color of FCC interpretations, and yet Plaintiffs are told they must beseech the FCC for redress. And the FCC, even if it were so inclined, has no power to compensate persons whose rights have been annihilated.

If an agency, or even the legislature, clearly misinterprets or nullifies a constitutional provision, the frequent repetition of the wrong will not make it right. (*Amos v. Mosley*, 77 So. 619)

Under the principles of powers, it is settled that the legislature may not confer judicial functions upon the members of the executive branch of government. Ministerial officers are incompetent to to receive grants of Judicial powers from the legislature, and their acts in attempting to exercise such powers are necessary nullities. *16 AmJur 2d § 328*

Nor, may the people look to Congress to rein in the powerful masters of the media. If the fourth estate has the power to bring down a presidency, reelect or defeat a congressman, how rare will be a courageous representative worthy to be mentioned in the profiles of courage, much less an effective majority?

14. Plaintiff's Case States Sufficient Cause Of Action

The denial of express rights, and the denial of equal enforcement of the laws by defendants was motivated by hostility to plaintiff, his ideas and views, and the classes and their interests that plaintiff seeks to represent and defend.

This is an action provoked by a "class-based, invidiously discriminatory animus behind the conspirators' action." It is a conspiracy that aimed "at a deprivation of the equal enjoyment of rights secured by the law to all. *Griffin v. Breckenridge,* 403 U.S. 88, 102; 91 S.Ct. 1790, 1798; 29 L.Ed.2d 338, 348 (1971)

The court added in footnote 10: "The motivation requirement introduced by the word 'equal' into the portion of § 1985(3) before us must not be confused with the test of 'specif-

ic intent to deprive a person of a federal right made definite by decision or other rule of law' articulated by the opinion in *Screws v. United States,* 325 U.S. 91, 103, 65 S.Ct. 1031, 1036, 89 L.Ed. 1495, for prosecution under 18 USC § 242. Section 1985(3), unlike § 242, contains no specific requirement of 'wilfulness.' *Cf. Monroe v. Pape,* 365 U.S. 167, 187, 181 S.Ct. 473, 484, 5 L.Ed.2d 492. The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus."

"Our cases have firmly established that (constitutionally protected rights do) not necessarily rest on the Fourteenth Amendment, and (claims are) assertable against private as well as governmental interference. *Shapiro v. Thompson,* 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328-1330, 22 L.Ed.2d 600; *id.,* at 642-644, 89 S.Ct. at 1335-1336 (concurring opinion); *United States v. Guest,* 383 U.S. 745, 757-760 and n. 17, 86 S.Ct. 1170, 1177-1180, 16 L.Ed.2d 239; *Twining v. New Jersey,* 211 U.S. 78, 97, 29 S.Ct. 14, 18, 53 L.Ed. 97; *Slaughter-House Cases,* 16 Wall 36, 79-80, 21 L.Ed. 394; *Crandall v. Nevada,* 6 Wall 35, 44, 48-49, 18 L.Ed. 744; *Passenger Cases (Smith v. Turner),* 7 How. 283, 492, 12 L.Ed. 702 (Taney, C.J., dissenting).

"[T]he Supreme Court decided in 1971 to 'accord the words of the statute their apparent meaning' and held section 1985(3) provided a civil remedy for damages against wholly private infringements of constitutionally protected rights. *Griffin v. Breckenridge,* 403 U.S. 88, 97; 91 S.Ct. 1790, 1795; 29 L.Ed.2d 338, 345 (1971)"

Scott v. Moore, 640 F.2d 708 (5th Cir. 1981) at 715

Griffin established four elements for plaintiff to establish cause of action: [1] conspiracy; [2] purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; [3] one or more of the conspirators must commit some act in furtherance of the conspiracy; whereby [4] another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States. *Griffin v. Breckenridge,* 403 U.S. 88, 102-103; 91 S.Ct. 1790, 1795; 29 L.Ed.2d 338, 348 (1971)

The 5th Circuit added a fifth element: (5) that the conspirators' conduct must be unlawful independent of the section 1985(3) violation. *McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919 (5th Cir. 1977)(en banc). This was superseded, *Wilson v. Harris Trust & Sav. Bank,* (CA7 Ill) 777 F.2d 1246, and disagreed with by many cases, see *Traggis v. St. Barbara's Greek Orthodox Church,* (CA2 Conn) 851 F.2d 584.

Instant [*Forbes*] case meets all four elements of the *Griffin* test, plus the superfluous "independent" transgression. Ironically, *because* it meets the fifth test, the independent violation of Title 47 sections by defendants, the lower court penalizes plaintiffs rather than upholding the pleadings.

Title 47 also regulates the rates commercial licensees, such as the KHOG defendants, may charge candidates. All four commercial television stations that unlawfully censored candidate Forbes' political ads have almost 50% of their market areas outside of Arkansas, in Oklahoma, Missouri and Kansas. While it is true residents of sister States could not vote for Forbes, many Arkansans may have had an opportunity to have seen one of Forbes' ads while exercising their right to travel in one of the adjoining States *if* the defendants had not censored the ads. And, the candidacy of plaintiff may have been helped by contributions from viewers in adjoining States. Plaintiff had the right to express his views, based on quotations from Scripture and Thomas Jefferson with all Americans.

Commerce clause empowered Congress to reach private conspiracy. Article I, section 8, clause 3 "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co,* 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. *United States v. Women's Sportswear Mfg, Ass'n.,* 336 U.S. 460, 464, 69 S.Ct. 714, 716 93 L.Ed. 805, 811 (1949). et seq.

Scott v. Moore, 640 F.2d 708 (1981) at 726

Availability of injunctive remedy under 42 USC § 2000a does not preclude recovery of monetary damages under 42 USC 1985(3). *Fisher v. Shamburg*, (1980, CA10 Kan) 624 F.2d 156

Exhaustion of administrative and state court remedies is not prerequisite for jurisdiction.

Hazard v. Weinberger, (1974 SD NY) 382 F.Supp. 225, affd without op (CA2 NY) 519 F.2d 1397

Even anti-injunction provisions of Norris-LaGuardia Act did not deprive court of jurisdiction to enjoin deprivations under 42 USC 1985(3).

Non-union workers were a protected class with First Amendment right to freely associate protectable by court.

"The Ku Klux Klan Act was originally entitled, 'An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes.' 17 Stat. 13 (1871). The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *E.g. Williams v. Rhodes,* 393 U.S. 23, 30-31, 98[sic] S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan,* 376 U.S. 254, 276-77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 704 (1964); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed 1213, 1217 (1940); *DeJonge v. Oregon,* 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). Moreover, the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment. *E.g., Abood v. Detroit Board of Education,* 431 U.S. 209, 233, 97 S.Ct. 1782, 1798-99, 52 L.Ed.2d 266, 279 (1972); *Baird v. State Bar of Arizona,* 401 U.S. 1, 6, 91 S.Ct. 702, 705, 27 L.Ed.2d 639, 646 (1971); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462, 78 S.Ct. 1163, 1171-72, 2 L.Ed.2d 1488, 1499 (1958)"

Scott v. Moore, 640 F.2d 708 (1981) at 716

"Furthermore, extending section 1985(3) protection to include conspiracies motivated by nonracial class animus comports favorably with the Supreme Court's approach to other Reconstruction civil rights statutes in recent years 'to "accord

[them] a sweep as broad as [their] language." ' " *Griffin v. Breckenridge,* 403 U.S. 88 at 97; 91 S.Ct. 1790 at 1796; 29 L.Ed.2d 338 at 345 (1971) ...

"[S]ection 1983 makes no specific reference to race, and a wide variety of nonracial classes have sought and won relief from discriminatory treatment under section 1983. *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (prisoners); *Johnson v. American Credit Co.,* 581 F.2d 526 (5th Cir. 1978) (debtors attacking state pre-judgment attachment procedure); *Morris v. Michigan State Bd. of Education,* 472 F.2d 1207 (6th Cir. 1973) (sex). Since section 1985(3), like section 1983, is not cast in racial terms, consistency demands that section 1985(3) also be read to protect nonracial classes."

Scott v. Moore, 640 F.2d 708 (1981) at 719

Petitioner respectfully points out that *Means* {and *Hare Krishna* case cited in appellant's separate *Brief*} also clearly show that court below was in error to dismiss because plaintiffs did not allege racial bias.

"However, the congressional debates evince a hearty regard for persons who are victimized because of their *political* beliefs and associations. {Emphasis on "*political*" supplied by appellant.} Today's Ku Klux Klan proclaims itself to be a racist organization. But in 1871 it was regarded primarily as a *political* one ... Senator John Sherman of Ohio voiced this concern after he read aloud from a copy of the Klan's secret oath, 'showing that here is a *political* organization, with *political* ends, *political* aims ...' Cong. Globe, 42d Cong., 1st Sess. 153 (1871). The Klan's *political* objective formed a recurrent theme in the Senate debates."

Scott v. Moore, 640 F.2d 708 (1981) at 721

"{All of the plaintiffs and defendants were American Indians and members of the same tribe, the Oglala Sioux.} In interpreting this class-based discrimination test the Fifth Circuit has said:

'There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; it need not be

an initiation rite; but at least it must have an intellectual nexus which has somehow been communicated to, among and by members of the group.'

Westberry v. Gilman Paper Co., 507 F.2d 206,215 (5th Cir. 1975) ... in our opinion, the reasoning above quoted was and is valid in the light of *Griffin.* The group of plaintiffs in this case, by their affirmative acts of supporting plaintiff (by petitions, votes, etc.) ... were a class against whom ... the defendants discriminated against because of their class membership. This brings their complaint within the ambit of 42 U.S.C. § 1985(3). *Cameron v. Brock,* 473 F.2d 606, 610 (6th Cir. 1973).

Means v. Wilson, 522 F.2d 833 at 840 (8th Cir. 1975) citing;

"However, courts have also granted protection to classes {in addition to women, Jews, and religious bodies} whose members are discriminated against because of their *political* beliefs or their associations. *See, e.g., Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976) (supporters of a particular political candidate); *Gleason v. City of Louisville,* 518 F.2d 899 (6th Cir.), *cert. denied,* 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975) (political demonstrators); *Smith v. Cherry,* 489 F.2d 1098 (7th Cir. 1973), *cert. denied,* 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) (voters for a sham political candidate); *Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973)(supporters of incumbent sheriff); *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971)(worshippers at a predominantly white Catholic church disrupted by black civil rights protestors).

Scott v. Moore, 640 F.2d 708 (1981) at 723

CONCLUSION & REMEDY

Therefore, from all of the foregoing and the points and authorities in separate *Brief* re *DeYoung,* Plaintiff has presented a case, that if proven, is a cause of action. The order of the district court dismissing the pleadings with prejudice should be reversed. Plaintiff should be granted sufficient time and opportunity to amend the complaint and to proceed with discovery.

It is a fact, not a conclusion, that AETN defendants denied plaintiff equal enforcement of the laws in violation of

the Constitution and law, under color of law, and abridged and trespassed against First Amendment secured rights.

It is a fact, not a conclusion, that KHOG defendants censored plaintiffs ads in violation of the Constitution and law, under color of law, and discriminated against him and the classes he represents.

It is a fact, not a conclusion, that other unnamed defendants to control the outcome of a run-off, selectively closed 90% of the polling places in the 72 counties petitioner had carried in the preferential primary in 1990, in violation of the Constitution and law, under color of law, and discriminated against him and the classes he represents.

It is a fact, not a conclusion, that all defendants acted out of "class-based, invidiously discriminatory animus" against plaintiff, his positions and expressions, and the classes and ideas, he represents.

Wherefore, Plaintiff/appellant respectfully moves this honorable Court to reverse and void the December 16, 1992, order of the district court dismissing complaint with prejudice, and such appropriate orders and remedies that will effectually preserve plaintiff's rights.

Respectfully,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person,

Box 88
London, AR 72847
501/293-4641

AFFIDAVIT OF VERIFICATION OF FACT

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this 16 Day of Feb, 1993.
My Commission expires June 30, 1996.

s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, s/ Karen Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 16th Day of Feb, 1993, by U.S. mails.

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APPENDIX W

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 93 -1031 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS, et al.,
v.
ARKANSAS EDUCATIONAL TELEVISION COMMUNICATIONS NETWORK FOUNDATION, et al.,
APPELLEES.

PLAINTIFF'S COMBINED REBUTTAL TO BRIEFS OF AETN & KHOG DEFENDANTS

**"INJUSTICE *ANYWHERE*
IS A THREAT TO JUSTICE *EVERYWHERE.*"
Dr. Martin Luther King, Jr.**

* * *

A. Standard of Review

* * *

These pleadings should be regarded *de novo* as a whole and liberally construed by this honorable court.

Plaintiff submits that an amended complaint will show a long and continuing train of abuses and usurpations, pursuing invariably the same object, that evinces a design, a systemic pattern of deprivation of rights against plaintiff, and those classes he represents, by defendants, who are united in their purpose to deny Forbes and those he represents their substantive and equal rights, including a wholesale systematic closing of voting places that were required by law to be open.

Furthermore, *new evidence* has come to plaintiff's attention that contradicts what KHOG News Director Len Pitcock told Forbes on October 15th, 1992 (Page 7, ¶11., Motion for Emergency TRO); and plaintiff alleges that the exclusion of Forbes from the KHOG sponsored debate was not an innocent oversight but a view point biased discrimination in violation of Amendments I, V, IVX of the U.S. Constitution; §1983 and §1985 of 42 USC; §315 of 47 USC; and numerous provisions of the Constitution and laws of the State of Arkansas.

B. THERE IS A RIGHT OF ACTION FOR VIOLATION OF RIGHTS, TO SECURE EQUAL PROTECTIONS OF THE LAW, FOR DUE PROCESS OF LAW AND A COMMON LAW RIGHT TO TRIAL BY JURY ...

THIS COURT HAS CONSTITUTIONALLY MANDATED JURISDICTION

... *Article III, Section II* ... *Article VI*, Constitution of the United States; ... *28 USC §1331* and 28 USC § *1343*.

This court's Order of December 22, 1992, expressly declared: "The underlying case is not moot. The complaint contains a prayer for money damages."

Can the FCC award plaintiffs monetary damages?

* * *

In suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved ... according to the rules of the common law.*

The Constitution of the United States, Amendment VII

This court's Order of December 22, 1992, denied plaintiff's request for rehearing en banc because "*it is no longer possible for the grant or denial of preliminary injunctive relief with respect to it to have any meaning.*" If this court itself can provide no remedy for the wrongs other than compensation, *how can a regulatory commission* that has jurisdiction *only* over the defendants' license to use certain radio frequencies for commercial purposes, *with no powers of redress, provide any meaningful relief?*

THE PEOPLES' RIGHTS & BELIEFS ARE *PRICELESS PROPERTIES*

"No person shall be ... deprived of life, liberty, or *property without due process of law.*"
The VIth Amendment to the Constitution of the United States of America

A law or procedure is *not* "due process" when it's in "conflict with the fundamental principles of liberty and justice which lie at the base of all civil and political institutions."
Bute v. Illinois, 333 U.S. 640, 92 L.Ed 986, 68 S.Ct. 763

James Madison, The Principle Framer & Father of *The Constitution, Bill of Rights*, and *Federalist Papers*, declared:
"**[A] man has a *property* in his opinions *and the free communication of them*** ... In a word, as a man is said to have a right to his property, *he may be equally said to have a property in his Rights.* Where an excess of power prevails, property of no sort is duly respected. *No man is safe in his opinions*, his person, his faculties, or his possessions... *Government is instituted to protect property of every sort* ... This being *the end* of government ... *Conscience is the most sacred of all property*; other property depending in part on positive law, *the exercise of that being a natural and inalienable right* ... Madison, *Property*, 1792

Plaintiff's liberties of conscience and beliefs *and the free communication of them* are his most priceless possessions and personal property enjoying special protections of the laws. The defendants have wilfully, wickedly and maliciously, under color of regulation, deprived plaintiff and the people, the classes he represents of this "most sacred of all property."

Moreover, *if* the defendants had not conspired to deny the people their right to cast an informed ballot there is a good chance that Plaintiff Forbes would have won a plurality in a "free and equal," open election, which the people were denied.

* * *

All persons who contributed time or funds to plaintiff Forbes' campaign had a reasonable right to expect that defendants would obey the laws so that [1] the viewpoints and expres-

sion they shared with Forbes would be fairly communicated without prior restraint, censorship or repression; and [2] that Forbes could campaign for these suppressed viewpoints on a playing field in which the minimal rights protected by law would be honored, not blatantly ravished; and [3] that their rights of political expression would enjoy equal protections that are afforded to persons who hold other viewpoints.

* * *

§315 is only one of *the many* Constitutional provisions *"and laws,"* violated by defendants, that secure "rights, privileges or immunities" of which plaintiffs have been deprived "under color of ... regulation" by the defendants, making them liable to the plaintiffs *"in at action at law ... for redress,"* pursuant to *42 USC §1983.*

C-1. PLAINTIFFS' GOD-GIVEN RIGHTS ARE ENFORCEABLE BY THE COURTS OF LAW.

In addition to the points and authorities cited in plaintiff's **Appeal from "Order to Dismiss"** showing that *this Court has jurisdiction ...47 USC 402 (a)* and *28 USC 158 ... "Explicitly* Provide For Judicial Review of The FCC." *to assure that the Commission remains faithful to that "clear statutory purpose."*

See *Maer v. FCC*, 735 F.2d 220 (1984) ft. note 4;
L. Jaffe, *Judicial Control of Administrative Action 569-575* (1965)

This court has power to set aside as unlawful any action that is unconstitutional, or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Administrative Procedure Act, 5 USCA 553, 706(2)(a)

C-2. THE DEFENDANTS ARE WITHOUT EXCUSE: *EVEN THE FCC CONDEMNS THEM*

On page 5 of their brief defendants refer to an FCC document of "a few days before Mr. Forbes filed his amended complaint." {No copy supplied by defendants.} "A few days before," on October 30, 1992, the FCC wrote a letter to Mr. Becker (DA 92-1503) in reference to a conflict over his desire to show a video showing an actual abortion procedure. The conflict in

that instance arose out of the fact that the Becker video *shows female genitalia,* and may come under the FCC's indecency definition of sexual organs under certain conditions.

This particular (*Becker*) video and controversy *have absolutely nothing whatsoever to do with* the (*Bailey*) footage used by Forbes which shows *no* sexual organs *and had been previously approved, over and over again by the FCC.*

Defendants either don't understand the factual issues, or they have misled the court re the *Becker* case which they purport "permits" the defendants' censorship, *because this October 30th letter specifically prohibited the defendants to censor or "channel" Forbes' ad.*

See footnote 1 of DA 92-1503 {*Plaintiffs Exhibit #20*} which says in pertinent parts:

"... **The Bureau concluded that the advertisement was *not indecent* and that *licensees therefore could NOT "channel" the ad to the indecency safe harbor without running afoul of sections 312(a) (7) and 315 of the Communications Act...*** {Emphasis supplied.}

* * *

Defendants claim justification for deprivation of plaintiffs' rights under color of FCC regulation; but defendants' actions are are all in breach of and *contrary to the very FCC rules* which they pervert into illicit monstrosities. These deviant dictates are the exact opposite of the clear and plain meaning of the letter and spirit of the laws they subvert and displace. This is totally subversive of congressional intent and constitutionality. The defendants shamelessly attempt to use these convoluted nullities as a fig leaf to try to hide their transgressions from the eyes of justice.

C-3. THE FCC IS INCOMPETENT *DE JURE & DE FACTO* TO REDRESS INJURIES

The defendants are attempting to mislead the controversy away from the basic fact that *plaintiffs have suffered great irreparable injury as a direct result of their violation of express, fundamental rights under color of law by the defendants.* This court must not be snared into straining at a gnat

while swallowing camels cooked up by the specious and insidious distortion of the case by the defendants.

The mere claim by defendants that "there is no private right of action" for violation of *47 USC §315, prima facie* demonstrates, establishes and proves that:

THE FCC SCHEME *Is Not An Adequate Remedy At Law;*

And therefore, forcing an injured party to surrender basic rights to a *non-judicial,* extra-constitutional commission that has no lawful jurisdiction, *no powers to redress nor compensate,* no true due process, no motivation or inclination, nor history or record of providing justice and indemnification, *is not a lawful substitute for the right to the day in court, to which an injured party is entitled to by right.*

Petitioner Forbes does not waive, surrender or forsake his priceless birthright, nor the common law birthrights of we, the people, for any mess of pottage, particularly the fraudulent FCC scheme.

D. PLAINTIFF EXHAUSTED ADMINISTRATIVE REMEDIES

Petitioner asseverates that on November 2, 1992, he wrote and mailed a letter* to Mr. Milton Gross at the FCC complaining about the defendants' violation of 47 USC §315 and the FCC's own findings. *To this date, your petitioner has heard not one word from the FCC in response to this serious allegation. ...*

All Laws Which Are Repugnant To The Constitution *Are Null And Void.* {Chief Justice MARSHALL}
Marbury v. Madison, 1 Cranch 137, 174, 176 (1803)

Two centuries before the landmark *Marbury* decision, Lord Coke in Dr. Bonham's case (1610) declared: "[T]hat when Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

The language of the Constitution cannot be interpreted safely, except where reference to Common Law (as it was in understood in Britain is made)... when the instrument was framed and adopted. The statesmen and lawyers of the convention who

submitted it to the ratification of the thirteen states, were born and brought up in the atmosphere of the Common Law and thought and spoke in its vocabulary ... when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of Common Law, confident that they could be shortly and easily understood.

Ex Parte Grossman, 267 U.S. 87, 108

All laws should receive a sensible construction. General terms should not be so limited in their application as to lead to injustice, oppression or an absurd consequence.

United States v. Kirby, 7 Wall 482

It is demonstrably not true that there exists anything remotely resembling an "effective, comprehensive administrative scheme" to protect a candidate's rights to equal access and the public's rights to be informed. *IF it existed this case would never have come to court.* Plaintiff's rights and the people's rights would not have been violated. Plaintiff did **not** want to be forced to appeal to the courts, at great personal costs in time, energy and money against the legal powers of the state and powerful, legal firms that specialize in protecting powerful interests who act as if they are above the law, for enforcement of his most fundamental rights. *Plaintiff did everything reasonable and lawful within his power to secure his rights.* There may be more than the usual animosity and prejudice against plaintiff, but the FCC "scheme" fails to protect everyone's rights "equally" in what can only be described as "equal opportunity tyranny." ...

Where Rights secured by the Constitution are involved there can be no rule making or legislation that would abrogate them. *Miranda v. Arizona*, 384 U.S. 436 at 491

"For a government official to mouth in a ritualistic way" {*U.S. v. Tarlowski*, 305 F.Supp. 112} certain Rights, while in effect reversing the meaning of the words used, he gravely transgresses. The FCC scheme purports to protect a candidate's rights to equal access and opportunity while in effect it forecloses any possibility of securing these rights. It is sham to give the appearance of "due process," that inexorably deprives the candidate and the people their rights all under color of "due process."

However, even IF it were true that plaintiff has not yet "exhausted" his pre-judicial remedies; to force him to first proceed to "exhaust his administrative remedies" would be a mere exercise in futility. Even *if* the FCC were to rule in his favor at this late date, *the FCC is even more powerless than this court to grant any "meaningful relief;"* **Therefore**, if waiting for a "final" refusal by the FCC were a requisite for plaintiff to seek redress in the courts of the land, *this action should not be dismissed "with prejudice"* in order to allow plaintiff to go through the administrative motions and then pursue his cause through the courts of law.

* * *

EQUAL TIME AND THE PUBLIC INTEREST

"From the very beginning of broadcasting in this country Congress has been aware of the potential of the new media to influence public opinion, particularly in the political forum. To say that time has confirmed that judgement is to understate the obvious. To protect political candidates, local and national, from the danger of partisan use of the media, as well as to protect the constitutional principle of electoral equality, congress inserted the equal time provision in its first major piece of legislation relating to broadcasting and it has remained the law to this day."

Chisholm v. FCC, 538 F.2d 349 (1976) 367, from minority opinion by the Honorable J. Skelly WRIGHT.

The case of *Office of Com. of United Ch. of Christ v. FCC*, 707 F.2d 1413 (1983) which included the following parties: Office of Communication of the United Church of Christ, FCC, CBS, National Association of Broadcasters, Radio Station Licensees, ABC, NRBA, MBS, Black Citizens for Fair Media, ACT, NOW, NAACP, Episcopal Church, Catholic Church, etc. yields the following points:

1. Courts accord only limited deference to an agency's interpretation of its own governing statute; *to do otherwise would risk diluting the judiciary's power to stand guard against bureaucratic excesses by ensuring that administrative agencies remain within bounds of their delegated authority.* (West Key 219[1])

2. It is the quintessential function of the reviewing court to ... strike down those agency actions that transverse the limits of statutory authority. (West Key 763)

3. ... courts remain the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with statutory mandate or that frustrate the congressional policy underlying a statute.

4. ...*abrupt shifts in policy constitute "danger signals" that the Commission may be acting inconsistently with its statutory mandate*... (West Key 14)

The Commission Has Ruled "Studio Debates" Between Candidates And "Debate-Type" Format Is *Precluded* From Classification As A *Bona Fide* News Event And Therefore *Do Not Exempt Licensee From Affording Equal Time* Under 47 USC 315. *35 ALR Fed 82* at 866

It is well defined that we require an agency to follow its own prior rulings and regulations. *Service v. Dulles*, (1954) 354 U.S. 363, 372, 77 S.Ct. 499, 98 L.Ed 681

The FCC was doing its job as authorized by Congress, until it bowed to the power of the licensees it was created to regulate and reversed its long standing enforcement of equal time, fairness, etc. And it is under color of these perversions that the defendants have deprived plaintiffs of their rights.

The common theme throughout the line of cases descending from *Red Lion* is the judicial intent to carefully craft a balance between all of the conflicting interests. This delicate balance was predicated upon [1] the assurance that the FCC would protect the paramount right of the people to be informed by enforcing *§312* and *§315* of the Act to prevent censorship, suppression, unlawful discrimination; and [2] the Fairness Doctrine which may be likened to a guy line which prevents a station's antenna tower from toppling to disaster. The FCC unilaterally slashed both of these tether lines that anchored the courts' "carefully crafted, delicate balancing act" and sent it crashing to destruc-

tion. Thus, the FCC has *de facto* overturned every restriction against full, equal and fair access to the FCC regulated media. ...

The inescapable conclusion is that the FCC lied to the courts and exceeded the bounds of statutory authority by reversing its own long standing positions and promulgating regulations that contravene congressional intent and collides with the Constitution of the United States, Articles I, II and III of the Constitution, which delegates and reserves the separate legislative, executive and judicial powers to the three respective branches of government and transgresses against the First, Fifth and Fourteenth Amendments.

"Those Then, Who Controvert This Principle, That The Constitution Is To Be Considered In Court As A Paramount Law, Are Reduced To The Necessity Of Maintaining That Courts Must Close Their Eyes On The Constitution And See Only The Law.

"THIS DOCTRINE WOULD SUBVERT THE VERY FOUNDATION OF ALL WRITTEN CONSTITUTIONS."

Marbury v. Madison, 5 U.S. 137 at 176, 1 Cranch 37, 163, 2 L.Ed. 60 (1803)

Wherefore, Plaintiff/appellant respectfully moves this honorable Court to reverse and void the December 16, 1992, order of the district court dismissing complaint with prejudice, and such appropriate orders and remedies that will effectually preserve plaintiff's rights.

Respectfully,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person,

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CERTIFICATE OF SERVICE

I, Ralph P. Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 1st Day of April, 1993, by U.S. mails.

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